No. 99-7000-CFH Title: Bobby Lee Ramdass, Petitioner
v.
CAPITAL CASE (1) Ronald J. Angelone, Director, Virginia Department of Corrections

Docketed:
November 15, 1999 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Nov 12 1999	Application (99A416) for a stay of execution pending the disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
	Nov 12 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 15, 1999)
	Nov 18 1999	Brief of respondent in opposition filed.
	Nov 19 1999	Reply brief of petitioner filed.
	Nov 23 1999	Application (99A416) referred to the Court by the Chief Justice.
	Nov 23 1999	Application (99A416) granted by the Court.
	Dec 2 1999	DISTRIBUTED. January 7, 2000
	Jan 7 2000	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, February 22, 2000. The brief of resondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 2000. A reply brief,if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 10, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT April 18, 2000. **********
	Jan 7 2000	Motions to file briefs as amicus curiae and any motions relating to oral argument must be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 24, 2000. Rule 29.2 does not apply.
	Jan 21 2000	Motion of petitioner for appointment of counsel filed.
	Feb 2 2000	DISTRIBUTED. February 18, 2000 (Page 35)
	Feb 22 2000	Motion for appointment of counsel GRANTED and it is ordered that F. Nash Bilisoly, Esquire, of Norfolk, Virginia, is appointed to serve as counsel for the petitioner in this case.
	Feb 22 2000	Brief of petitioner Bobby Lee Ramdass filed.
	Feb 22 2000	Joint appendix filed.
	Feb 22 2000	Joint appendix in two volumes.
	Mar 3 2000	Record filed.
	Mar 10 2000	CIRCULATED.
	Mar 23 2000	Brief of respondent Ronald J. Angelone, Director filed.
	Apr 10 2000	Reply brief of petitioner Bobby Lee Ramdass filed.
	Apr 18 2000	ARGUED.

1pp

(2)

No. 99-7000

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BOBBY LEE RAMDASS,
Petitioner-Appellant,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Bobby Lee Ramdass, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

48 pp

Petitioner has previously been granted leave to proceed *in forma pauperis* in the United States Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of Virginia, and the Supreme Court of Virginia.

Respectfully submitted,

Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, Virginia 23219
(804) 643-6845

*F. Nash Bilisoly
John M. Ryan
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 466-8600

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on 11/12/99, I caused the foregoing Motion for Leave To Proceed *In Forma Pauperis* to be served by hand delivery on Katherine P. Baldwin, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

F. Nash Bilisoly

No. 99-7000

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PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
November 23, 1999

Michele J. Brace, Esq.
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
Suite 510
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

***F. Nash Bilisoly, Esq.**
John M. Ryan, Esq.
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

***Counsel of Record*

99-7000
Ramdass
v
Angelone

Capital Case

QUESTIONS PRESENTED

1. *Simmons v. South Carolina* holds that when a prosecutor seeks the death sentence on the ground of the defendant's future dangerousness, the defendant has a constitutional right to inform the jurors truthfully that if they spare his life, state law forbids him ever to be released from prison. Does the rule in *Simmons* turn on the actual operation of state law, or on its hypertechnical terms; and must a federal habeas court adjudicating a *Simmons* claim make its own analysis of the functional consequences of state law, or is it bound by the state courts' characterization of state law for federal constitutional purposes?

2. *Ake v. Oklahoma* holds that an indigent capital defendant has a right to court assistance in obtaining the services of a mental health expert as a defense consultant and possible expert witness when the prosecutor puts the defendant's mental condition in issue in the course of seeking a death sentence on the ground of the defendant's future dangerousness. Is the *Ake* rule limited to cases in which the prosecutor presents expert testimony going to future dangerousness, or does it apply whenever the defendant's mental condition is to be a significant factor at sentencing?

3. In addition to rejecting petitioner's *Simmons* and *Ake* claims on the merits in an opinion presenting the two Questions set out above, the Court of Appeals held alternatively that 28 U.S.C. § 2254(d)(1) required it to accept the state-court resolution of those claims (and that *Teague* required it to accept the state-court rejection of petitioner's *Simmons* claim) without independent federal adjudication. These alternative grounds invoked the same Fourth Circuit construction of § 2254(d)(1) that this Court is reviewing on *certiorari* in *Williams (Terry) v. Taylor*. Is that construction erroneous?

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IN THE
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BOBBY LEE RAMDASS,

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v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
November 23, 1999

Bobby Lee Ramdass, a Virginia inmate under sentence of death, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing the district court's grant of Ramdass' petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999), and is reprinted in the accompanying Appendix ("App.") at 1-20. The opinion of the

district court is reported as *Ramdass v. Angelone*, 28 F. Supp.2d 343 (E.D. Va. 1998), and is reprinted at App. 21-52. The initial opinion of the Virginia Supreme Court on direct review is reported as *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1994), and is reprinted at App. 56-64. This Court's order granting certiorari, vacating that judgment, and remanding for reconsideration in light of *Simmons* is reported as *Ramdass v. Virginia*, 512 U.S. 1217 (1994), and is reprinted at App. 55. The opinion of the Virginia Supreme Court on remand is reported as *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994), and is reprinted at App. 53-54.

JURISDICTION

The court of appeals issued its judgment and decision on August 3, 1999. Ramdass filed a timely petition for rehearing and suggestion for rehearing *en banc* on August 17, 1999. The court of appeals denied the petition for rehearing on September 17, 1999. App. 65-66. Ramdass invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

For unknown reasons, Bobby Lee Ramdass went on a sudden crime spree in the summer of

1992. As relevant to this petition, his offenses included robbery at a Pizza Hut in Fairfax County, Virginia, on August 25, 1992; robbery at a Domino's Pizza in Alexandria, Virginia, on August 30, 1992; and robbery at a 7-Eleven in Fairfax County on September 2, 1992. During the 7-Eleven robbery, Ramdass shot and killed Mohammed Kayani, a store employee.

Ramdass was quickly apprehended, and the various charges against him came on for trial in rapid succession. A jury found Ramdass guilty of the Pizza Hut robbery on December 15, 1992, and the trial court entered judgment on January 22, 1993. Another jury found him guilty of the Domino's Pizza robbery on January 7, 1993, and the trial court entered judgment on February 18, 1993. A third jury found him guilty of capital murder for the death of Mohammed Kayani on January 28, 1993, and it fixed his sentence at death on January 30, 1993. The sole aggravating factor establishing Ramdass' eligibility for death in the capital case was the jury's finding that he likely "would commit criminal acts of violence [in the future] that would constitute a continuing serious threat to society." Virginia Code § 19.2-264.4(C).

This petition concerns two ways in which Ramdass was prevented from rebutting the evidence of future dangerousness and presenting the jury with reasons to impose a sentence less than death.

I THE VIOLATION OF *SIMMONS v. SOUTH CAROLINA*

A. Trial and Direct Appeal

During sentencing deliberations in the capital case, the jury sent out the following question: "If the Defendant is given life, is there a possibility of parole at some time before his natural death?" (JA 154).[1] Over counsel's objection, the court advised the jurors not to concern themselves with

[1] The term "JA" refers to the joint appendix in the proceedings before the Fourth Circuit. Respondent reportedly has lodged a copy of that appendix with the Court.

what may happen after sentencing. (JA 157). Although Ramdass maintained that he was not eligible for parole, the Virginia Supreme Court upheld the constitutionality of this ruling on direct appeal, and it affirmed the death sentence. App. 63. Ramdass challenged the ruling again in a petition for writ of certiorari. This Court granted certiorari, vacated judgment, and remanded for reconsideration in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994). App. 55.

On remand, Ramdass asserted that his rights under the due process clause of the Fourteenth Amendment were violated by the trial court's refusal to provide the jurors with truthful information about the impossibility of release on parole. Ramdass posited that he was not eligible for parole under Virginia's "three strikes" law, which provides in relevant part that:

> [a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

Virginia Code § 53.1-151(B1).[2] Ramdass identified his three qualifying convictions as the Pizza Hut offense, the Domino's Pizza offense, and the capital murder.

The Virginia Supreme Court agreed that the Pizza Hut robbery counted as the first "strike" under the statute, and the capital murder counted as the second "strike." App. 54. The court refused to count the Domino's Pizza robbery as the third "strike," however, on the ground that Virginia's parole statute specifically requires three "convictions," and a jury verdict of guilt does not become a conviction until it is reduced to judgment. App. 43. The court held that because the Domino's Pizza verdict was not reduced to judgment until about two weeks *after* the capital murder sentencing trial, Ramdass was technically still eligible for parole on the day that the jury considered his sentence

[2] Virginia Code § 53.1-151 is reprinted in full at App. 68-70.

for capital murder. App. 54. The state court treated this analysis of the meaning of the word "conviction" as dispositive of Ramdass' constitutional rights under *Simmons*, and it again affirmed the death sentence. App. 54. This Court denied certiorari review. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

B. Federal Collateral Proceedings

After exhausting state remedies, Ramdass filed a federal petition for writ of habeas corpus.[3] As his first issue, Ramdass alleged that the trial court violated his rights under the Eighth and Fourteenth Amendments when it refused to provide the jurors with truthful information that if they sentenced the defendant to life imprisonment, there was no possibility of release on parole. Ramdass pointed to specific language in *Simmons* stating that the rule in that case applies when state law prohibits the possibility of release on parole, and he contended that the rule is not limited to cases where the defendant is technically ineligible for parole. The difference between these two formulations is subtle but important. In Ramdass' view, *Simmons* directs courts to employ a pragmatic, functional test of the possibility of release on parole; it does not demand the use of a technical, legalistic test.

The magistrate judge recommended that the writ be granted on the *Simmons* issue because the state court's hypertechnical decision was "contrary to clearly established Federal law, as

[3] Ramdass alleged in his state habeas petition that his rights under both the Eighth and Fourteenth Amendment rights were violated when the trial court refused to inform the jury that if they sentenced Ramdass to life imprisonment, he would not be considered for release on parole during his lifetime. (JA 251-54). The state habeas court dismissed this claim under its rule against repetitive review, citing *Hawks v. Cox*, 175 S.E.2d 271 (1970). (JA 283). The rule in *Hawks* does not bar consideration of a claim in federal court. *See, e.g., Correll v. Thompson*, 63 F.3d 1279, 1289 n.8 (4th Cir. 1995) (*Hawks* is a rule in the nature of collateral estoppel; "a dismissal under *Hawks* does not bar federal habeas review"), *cert. denied*, 516 U.S. 1035 (1996).

determined by the Supreme Court of the United States." (JA 805). He noted "that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was 'a possibility of parole at some time before his natural death.'" (JA 810). He concluded, "[t]his Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. . . . The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion." (JA 811-12).

Following *de novo* review, the district court granted the writ because the state court's decision "involved an 'unreasonable application' of *Simmons* as determined by the Supreme Court of the United States." (JA 850). "[B]y concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*." (JA 858). Further:

> assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at [162].

(JA 858).

A divided panel of the Fourth Circuit reversed. The majority held that *Simmons* applies only in the narrow circumstances where a defendant is technically and legally ineligible for parole on the

date of the capital sentencing proceeding. The majority essentially advanced three reasons. First, it announced that *Simmons* turns solely on the state court's determination of its own law, and that this determination is dispositive:

> [T]he fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

App. 11 (emphasis omitted).

Second, the majority said that conditioning the application of *Simmons* on a functional determination that the defendant will never be eligible for release on parole "is simply incompatible with the logic of *Simmons* itself." App. 10. According to the majority, this logic is reflected by statements in Justice O'Connor's concurrence such as, "We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." App. 10 (quoting *Simmons*, 512 U.S. at 165) (Fourth Circuit emphasis omitted).

Third, the panel majority held in the alternative that relief could not be granted under AEDPA. "Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that was not 'clearly established' as required by 28 U.S.C. § 2254(d)(1)." App. 11. After discussing the similarities between Section 2254(d)(1) and the antiretroactivity doctrine in *Teague v. Lane*, 489 U.S. 288 (1989), the majority added that Ramdass' claim would fail "either under *Teague* or under § 2254(d)(1)." App. 11-12.

Judge Murnaghan dissented on each of these points. First, he emphasized that "the scope and parameter of the *Simmons* right is a matter of federal constitutional law." App. 18. "Admittedly, the

[due process] right recognized in *Simmons* . . . only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right." App. 18. He explained that federal due process was denied because only a hypothetical future development of the sort rejected by *Simmons* could make Ramdass eligible for release, and he berated the majority for "hid[ing] . . . behind a state law shield." App. 20.

> [A]t the time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. . . . Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible [under state law] when the Kayani conviction was formally entered.

App. 20.[4]

Second, Judge Murnaghan declared that far from being incompatible with the logic of *Simmons*, a functional assessment of the possibility of release on parole is consistent both with "the genesis of *Simmons* [as] merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349 (1977), and *Skipper v. South Carolina*, 476 U.S. 1 (1986)," and with the specific language in the *Simmons*

---

[4] Entry of judgment was a ministerial act under state law, as applied to the circumstances of this case. At the time of the penalty phase in Ramdass' capital murder trial, the judge presiding over the Domino's Pizza matter already had denied Ramdass' motion to set aside the jury's verdict in that robbery case under Virginia Supreme Court Rule 3A:15(a), and the motion could not be renewed. *See* App. 67 (reprinting Rule 3A:15). This denial locked up the verdict and reduced the subsequent entry of judgment to a ministerial act. Although there was still a hypothetical possibility that the judge presiding over the Domino's Pizza matter could set aside the robbery verdict under Virginia Supreme Court Rule 3A:15(b) and thus eliminate the third "strike," there was an identical possibility that the judge presiding over the Pizza Hut matter could set aside *that* robbery verdict under Rule 3A:15(b) and eliminate the first "strike." In both robbery cases, the statutory 21-day window for setting aside a conviction under Rule 3A:15(b) was still open at the time of Ramdass' capital murder sentencing trial. The Virginia Supreme Court necessarily rejected any reliance on the hypothetical possibility of release under Rule 3A:15(b) when it held that the Pizza Hut conviction nonetheless counted in full as a "strike."

opinions. App. 18-19. "I do not believe that due process requires or allows [the majority's] arbitrary results." App. 20.

Third, because the clearly established rule in *Simmons* fully covers Ramdass' circumstances, Judge Murnaghan recognized that AEDPA presents no impediment to the grant of federal habeas corpus relief.[5]

The Fourth Circuit denied Ramdass' petition for rehearing en banc on September 17, 1999, with one-third of the court dissenting. App. 65-66.

II THE VIOLATION OF *AKE v. OKLAHOMA*

A. Trial and Direct Appeal

Recognizing that his cumulative offenses might make out a prima facie case for future dangerousness, Ramdass hoped to present mental health evidence that would rebut the case for future dangerousness and persuade a jury to sentence him to life imprisonment. Because the defendant was indigent, counsel moved before trial for the assistance of a mental health expert. The court granted this motion, and it *sua sponte* selected Dr. Stanton Samenow, a psychologist, to assist the defense.

Dr. Samenow's report to counsel did nothing but lambaste the client, using language one would expect to see in the report of a *prosecution* expert. According to Dr. Samenow, Ramdass is able to conform his conduct to societal norms

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[5] Judge Murnaghan specifically distinguished Ramdass' case — in which the defendant would be absolutely ineligible for release on parole after the performance of all ministerial acts — from previous Fourth Circuit cases cited by the majority in which the court had refused to "extend" *Simmons* to defendants who "remained eligible for parole under state law even when all ministerial acts were completed." App. 19, n.5. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.) (rejecting claim that defendant was entitled to inform jury that if sentenced to life imprisonment, he would not be eligible for parole for at least 25 years), *cert. denied*, ___ S. Ct. ___, 1999 WL 688646 (Nov. 1 1999).

but has been unwilling to do so. He has lived essentially a lawless life in which he has pursued the excitement of the moment and sought to build himself up by overcoming others through deception, intimidation, and violence.

. . . .

Bobby Lee Ramdass has been intent on doing whatever he pleases with little regard to the consequences.

. . . .

The requirements of specific individuals or of society are irrelevant in Bobby's view. . . . [D]oing something just because it was forbidden or just on a dare was commonplace. Then, if held accountable, Mr. Ramdass would try to deflect the blame.

Samenow Report at 2-5.[6] Dr. Samenow's report spent three and a half pages detailing Ramdass' upbringing "in an atmosphere in which violence was a way of life." Samenow Report at 6-9. His mother was "a person who was dishonest, working only sporadically, unable to cope as a mother, of limited intelligence, promiscuous and violent." She taught Ramdass how to shoplift and he "joined with his mother in attacking and robbing others." Samenow Report at 7. Dr. Samenow quoted a 1986 psychiatric evaluation of Ramdass in which another expert had concluded:

> He is from an unbelievably dysfunctional family which has presented the worst possible role models to him. He has himself been violently abused by others . . . those who have interviewed him have uniformly been impressed with his amoral, immoral and delinquent attitudes. When one reads the social service description of his mother's personality, *one sees that he is the expectable product of his environment*.

Samenow Report at 8 (emphasis added). Nonetheless, Dr. Samenow's report dismissed the potentially mitigating conclusion of the 1986 evaluator:

> During the current evaluation, a picture emerged that somewhat *takes exception* to a view that sees Mr. Ramdass simply as an "expectable product of his environment."

Samenow Report at 8 (emphasis added). According to Dr. Samenow, Ramdass "chose" his criminal path in life, has only "the most primitive concept of injury to others," and "believes that the worst

[6] A copy of Dr. Stanton Samenow's report to defense counsel has been lodged with the Court.

thing he has ever done is to hurt his girlfriend 'by getting locked up.'" Samenow Report at 11-12.

After receiving this report, counsel concluded that there was no usable mental health evidence because Dr. Samenow "was unwilling and unable to assist the defense and would not be able to testify on behalf of Mr. Ramdass." (JA 445-46). As a result, counsel simply presented no mental health evidence, either to rebut the state's case for future dangerousness or to show why the jury should be moved to impose a sentence less than death.

Trial counsel did not challenge Dr. Samenow's competence in the direct appeal.

B. State Collateral Proceedings

In his state habeas petition, Ramdass alleged under the Fifth, Sixth, Eighth, and Fourteenth Amendments that he "was denied the reasonable assistance of a mental health expert." (JA 229). Citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), Ramdass contended that Dr. Samenow is not the "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense" that *Ake* promises. (JA 229). Rather, "Dr. Samenow is notoriously pro-prosecution and did not assist the Petitioner's defense." (JA 229). Because Dr. Samenow was incapable of assisting the defense, appointing Dr. Samenow essentially was equivalent to not appointing any expert at all.

Ramdass moved the state habeas court for the appointment of "a competent, independent mental health expert . . . to perform a competent psychological evaluation . . . [and] to advise [state habeas] counsel on . . . the significance of his findings for showing mitigating circumstances or for rebutting the Commonwealth's case on future dangerousness." (JA 268). The Virginia Supreme Court summarily denied this request. (JA 279).

Shortly thereafter, the Virginia Supreme Court issued another summary order denying habeas

corpus relief. After it dismissed enumerated claims on procedural grounds, the state habeas court addressed the merits of all remaining claims in the following two sentences: "and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, the Court denies petitioner's motion to remand for evidentiary hearing." (JA 283). Ramdass' allegation that he was denied the reasonable assistance of a mental health expert was included in this group of claims for which the state court found "no merit."

C. Federal Collateral Proceedings

Ramdass alleged again in his federal petition that he was denied the assistance of a mental health expert under *Ake* in violation of rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (JA 345-56). The district court, like the state court, refused to authorize funds for a mental health expert. (JA 682-89, 696). Because new federal habeas counsel were willing to reach into their own pocket,[7] they were able to obtain a preliminary affidavit from Dr. Reuben Koller, a competent psychologist. Dr. Koller detailed the inadequacies in Dr. Samenow's evaluation of Ramdass that made the pretrial evaluation "incomplete, deficient and inadequate according to conventional psychological standards," (JA 474). Dr. Koller recommended additional testing to

[7] This is a common phenomenon in Virginia capital cases on habeas corpus. Without exception, the Virginia Supreme Court has denied every indigent petitioner's motion for expert or investigative assistance. Appointed state habeas counsel — often a solo practitioner — has been unable or unwilling to underwrite the cost of experts or investigators. Federal habeas courts have appointed new counsel in nearly every case, often from a much larger firm, and the new lawyers sometimes have been willing and able to finance privately the cost of the experts and/or investigators. *See, e.g.*, Petition for Writ of Certiorari in *Williams (Michael) v. Taylor*, No. 99-6615, at 31 n.15 (explaining that state habeas court refused to fund investigator, and that new federal habeas counsel discovered claims relating to partiality of juror only after they privately funded and retained an investigator), *cert. granted*, ___ S. Ct. ___, 1999 WL 980144 (Oct. 28, 1999).

determine if Ramdass suffers from a discrete mental illness.[8] (JA 474-77).

More importantly, Dr. Koller revealed in his affidavit that Dr. Samenow harbors well-known, preconceived, and radical notions about mental health issues that render him *incapable* of doing what *Ake* requires — incapable of rebutting future dangerousness or identifying reasons for a sentence less than death. Dr. Samenow's professional views are far outside the mainstream of psychiatric thought. (JA 474). Dr. Samenow rejects the concept of mental illness, and he also rejects the basic psychiatric principle that an individual's personality is affected by environmental factors. (JA 473-74). Dr. Samenow's viewpoint is considered to be so radical that it has not been adopted by any recognized authorities. (JA 473-74).

Dr. Koller's affidavit is corroborated by Dr. Samenow's own publications and interviews. In his 1977 treatise, *The Criminal Personality*, Dr. Samenow refers to criminals as a "different breed of person" who "knows circumstances have nothing to do with his violations, but [who] uses that rhetoric if he thinks it will lead others to view him more sympathetically." (JA 347). "The application of a mental illness diagnosis to this [criminal] population [i]s a consequence of the tortuous extension of psychologic concepts by mental health professionals. Most diagnoses of mental illness result[] from the criminal's fabrications. By his accountability statements, he mis[leads] many examiners into believing that he [i]s mentally ill." (JA 348).

In his 1984 book, *Inside the Criminal Mind*, Dr. Samenow continued this theme and rejected "the widely-held beliefs that broken homes, alcoholism, violence on TV, unemployment, drug-addiction, or passionate impulses are the causes of crime." (JA 346). The criminal "chooses crime . . . his associates, his way of life, the kind of crime he commits." (JA 346). "He rejects society

[8] The district court denied funding for the recommended testing.

long before society rejects him; he is victimizer, not victim." (JA 346).

In a feature interview for the CBS News program *60 Minutes* on February 20, 1977, Dr. Samenow elaborated on his belief that psychiatry is a tool for "excuses for crime." (Counter Number 102).[9] He proclaimed that "criminals" who murder are "programmed" for killing and are not influenced by external forces. (Counter Number 325-32). Criminals "who have been found to be mentally ill" are not really mentally ill; they merely have been "coached by others" so they can "convince a doctor that [they're] mentally ill." (Counter Number 344-58). According to the *60 Minutes* commentator, Dr. Samenow's controversial views created a "tempest in the normally quiet world of criminal psychology" and made conventional psychiatrists "hopping mad." (Counter Number 039-42).

Because of his inherent bias, Dr. Samenow undoubtedly is *incapable* of "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation and presentation of the defense" for any defendant who has a criminal history. *Ake*, 470 U.S. at 83. Dr. Samenow is *incapable* of rebutting future dangerousness by showing, for example, that the defendant would respond positively and nonviolently in a structured environment, because this expert believes that environment is irrelevant. Dr. Samenow is *incapable* of rebutting future dangerousness by showing that the defendant's violent criminal behavior was the product of a mental disease or defect that might be amenable to treatment, because this expert does not believe in mental illness. And Dr. Samenow is *incapable* of presenting reasons why the jury should impose a sentence less than death because this expert believes that criminals are a "different breed of person" who have simply chosen to be

[9] A videotape of the *60 Minutes* interview was part of the record below, and Ramdass has lodged a copy of the videotape with the Court. Quotations from the interview are identified by Time-Code Counter Number.

criminals. In short, having the assistance of Dr. Samenow is constructively the same as having no mental health assistance whatsoever. *Cf. United States v. Cronic*, 466 U.S. 648, 659 (1984) (defendant's Sixth Amendment rights are violated when he is constructively, rather than actually, deprived of effective assistance of counsel). The district court ruled that this claim was defaulted, and it did not reach the merits of Ramdass' claim.

After close review of the record, the Fourth Circuit determined that Ramdass' claim was not defaulted. The panel majority held, however, that when the Virginia Supreme Court summarily denied Ramdass' *Ake* claim as having "no merit," it "did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d)." App 14. The court of appeals' basis for this conclusion, in full relevant part, was as follows:

> *Ake* provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82-83 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when *the State presents psychiatric evidence* of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

App. 14. In other words, because the state chose to present only *nonpsychiatric* evidence of future dangerousness, Ramdass did not have a clearly established right to a competent mental health expert to rebut the state's case for future dangerousness or to present psychiatric reasons why the jury should impose a sentence other than death.[10]

[10] The panel majority did not address Ramdass' contention that the state court's decision was "contrary to" clearly established federal law as determined by the Supreme Court. In concluding that the state court's decision did not involve an "unreasonable application" of clearly established federal law, the panel majority apparently followed binding circuit precedent holding that "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the

Judge Murnaghan concurred only in the judgment. App. 15, n.1. He agreed with Ramdass that "Dr. Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination." App. 15, n.1. Although Dr. Samenow is still a licensed psychologist, "[h]e has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior." App. 15-16, n.1.

Judge Murnaghan cited with approval several Tenth Circuit cases holding that *Ake* applies when the state presents *any* evidence of future dangerousness — psychiatric or nonpsychiatric — and the indigent defendant establishes a likelihood that his mental condition is a significant mitigating factor. *See, e.g., Liles v. Saffle*, 945 F.2d 333, 340-41 (10th Cir. 1991) (applying *Ake* in habeas corpus where prosecution presented only nonpsychiatric evidence of future dangerousness), *cert. denied*, 502 U.S. 1066 (1992). Constrained by AEDPA, however, Judge Murnaghan felt obliged to say that "*Ake*'s application when the prosecution has not presented its own *psychiatric* evidence on future dangerousness is not clearly established by the Supreme Court." App. 16, n.1 (emphasis added).

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relevant precedent in a manner that reasonable jurists would *all* agree is unreasonable." *Williams (Terry) v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998) (emphasis added), *cert. granted*, 119 S. Ct. 1355 (1999) (argued Oct. 4, 1999).

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT EMPLOYED STANDARDS FOR ANALYSIS THAT CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS, AND IT RENDERED A DECISION THAT CONFLICTS WITH *SIMMONS v. SOUTH CAROLINA*

A. Questions Concerning the Nature or Duration of Restraints on Liberty Require a Functional, Rather Than a Technical, Mode of Analysis

There has never been disagreement as to the practical reality of Ramdass' situation: If he was sentenced to life imprisonment, he was never going to have the opportunity to be considered for release on parole. No state or federal court judge has questioned that immutable fact. Nonetheless, because a ministerial requirement of state law had not yet been satisfied, the Virginia Supreme Court employed, and the Fourth Circuit majority ratified, a reading of *Simmons* that gave effect to technical parole eligibility and disregarded the functional reality of parole ineligibility. The Court should grant certiorari to decide whether such questions of restraints on liberty should be analyzed using a technical or a functional mode of analysis.

Whether application of *Simmons* turns on a "technical" or a "functional" analysis of eligibility for release from prison is a subspecies of a commonplace problem that has drawn this Court's repeated attention. That problem is the need to define category boundaries when a rule of federal constitutional or statutory law refers to a condition or status that is both a practical fact and a legal term of art. In closely analogous areas of the law that involve constitutional questions concerning the nature or duration of restraints on individual liberty, this Court has resolved the problem by rejecting solutions that "place[] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987).

In applying the requirement under *Miranda v. Arizona*, 384 U.S. 436 (1966), that warnings

must precede police interrogation when a person is "in custody," for example, this Court has asked whether the determination of "custody" turns on a purely *technical* analysis of the legal rules governing police powers of arrest and detention, or if it turns on a *functional* analysis of whether the circumstances reasonably would lead the person being interrogated to believe that he or she is not free to leave the stationhouse at will. The answer is that it turns on a functional analysis. *See, e.g., Stansbury v. California*, 511 U.S. 318, 322 (1994) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation"); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (officer's obligation to administer *Miranda* warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody'").

In determining whether an individual is "in custody" for purposes of federal habeas corpus jurisdiction, the Court similarly has applied a functional rather than technical test. In *Jones v. Cunningham*, 371 U.S. 236 (1963), for example, the Court held that a state prisoner who has been released on parole is nonetheless *functionally* "in custody" because he or she is still subject to various conditions and restrictions.

> [The Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.

Id. at 243. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that a state prisoner's pending habeas petition was not *functionally* moot for want of custody, even though his sentence had since expired and he had been discharged from parole:

> The substantial issue, however . . . , is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here. . . . [W]e conclude that . . . once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.

Id. at 238.

In applying the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment entitles an indigent defendant to the assistance of counsel "in all criminal prosecutions," the Court held in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), that the Sixth Amendment right to counsel turns on a *functional* determination of whether the conviction results in "imprisonment" — not on the state's *technical* classification of the offense as a felony or misdemeanor or petty offense. In determining the meaning of "imprisonment" for purposes of the *Gideon/Argersinger* rule, the Court held in *Baldasar v. Illinois*, 446 U.S. 222 (1980), that even if a state misdemeanor conviction does not *technically* result in the deprivation of liberty, that uncounseled misdemeanor conviction will *functionally* result in "imprisonment" if it transmutes a second misdemeanor conviction into a felony and thereby lead to a loss of liberty. And although the Court overruled *Baldasar* in *Nichols v. United States*, 511 U.S. 738 (1994), it did so by returning to the *functional* test it had articulated in *Scott v. Illinois*, 440 U.S. 367 (1979), that "the line should be drawn between criminal proceedings which themselves resulted in imprisonment, and those which did not." *Nichols*, 511 U.S. at 746.[11]

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[11] The same tension between technical and functional analyses can be found in cases addressing the sequence of events that relate to restraints on liberty. The Fourth Circuit majority characterized Ramdass' *Simmons* claims as merely a technical complaint about "the effect of the random timing of his trials." App. 12. But in *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964), the Court demanded a functional, pragmatic analysis of the effect of sequencing. Where the defendant has been taken into custody, "[i]t would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *See*

Under *Simmons*, the choice between a "technical" and a "functional" mode of analysis will affect a range of situations in addition to those which involve convictions that are not yet reduced to judgment, or which are subject to other procedural but pragmatically insignificant requirements. In South Carolina, for example, a post-*Simmons* statute requires the jury to engage in a two-step sentencing inquiry in a capital case.[12] The jury first decides whether there is an aggravating factor. If it does not find an aggravating factor, the jury's work is done, and the defendant is sentenced by the trial judge to life imprisonment or to a mandatory minimum term of thirty years. If, and only if, the jury finds an aggravating factor, they then decide whether to recommend a sentence of life

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generally Chatman-Bey v. Meese, 797 F.2d 987, 992-93 (D.C. Cir. 1986) (holding that government may not use method of determining date of parole eligibility for aggregated offenses if method produces different results depending on sequence in which crimes occurred) (holding approved *en banc*, *id.* at 994 n.10); *Thomas v. Brennan*, 961 F.2d 612 (7th Cir. 1992) (same).

[12] South Carolina Code § 16-3-20 is reprinted in full at App.71-75. The statute provides, in relevant part, as follows:

> (A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. . . . For purposes of this section, "life imprisonment" means until death of the offender. . . .
>
> (B) [I]f a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. . . .
>
> (C) Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. . . . Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). . . . If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

imprisonment or death. By operation of law, a sentence of life imprisonment in a capital case means life without parole.

This apparently straightforward South Carolina statute actually ensures that no capital defendant in South Carolina can "technically" qualify for application of the rule in *Simmons*, and therefore cannot inform the jurors that a sentence of life imprisonment means life without parole. That is because, at the moment the jury is instructed, the alternative to a death sentence might well be something less than life without parole (i.e., the jury might not find an aggravating factor and the defendant might be sentenced by the judge to a term of years). The defendant does not "technically" become ineligible for a sentence less of than life without parole until the middle of the sentencing deliberations, at the exact point when the jury finds an aggravating factor. Under a technical interpretation of *Simmons*, this South Carolina statute ensures that every juror who ultimately votes to recommend death will do so without knowing, at the moment of decision, that the only alternative to death is a sentence of life imprisonment without the possibility of parole.[13]

More hypothetically, circumstances could exist where the alternative to death is a term of years so long that, as a certainty, the defendant will not survive to come up for parole consideration even though he or she is technically eligible for parole. For example, state law might provide that if a capital defendant is not sentenced to death, he or she must be sentenced to a term of 500 years. *See, e.g., Ake*, 470 U.S. at 73 (noting that Ake was sentenced to "500 years' imprisonment on each of the two counts of shooting with intent to kill"). Even if state law allows prisoners to be considered for parole after they have served one-half of their sentence, a defendant sentenced to this term of

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[13] At least one South Carolina prosecutor already has blocked application of the rule in *Simmons* by making this precise "technical" argument. *See State v. Starnes* (Lexington County, S.C., sentenced Apr. 25, 1997) (appeal argued Sept. 21, 1999).

years functionally will never have the opportunity to come up for parole consideration, even though he or she is not "technically" ineligible for parole.[14]

The Fourth Circuit's restrictive view of *Simmons* leaves an important federal due process right subject to the vagaries of highly technical, sometimes arcane, and certainly manipulable state laws, even when functionally there is no possibility of parole. The lower court's ruling, which is at odds with this Court's disposition of similar constitutional questions, and which may have effects well beyond this case, is a matter of special and national importance that merits review by this Court.

B. Federal Questions Require a Mode of Analysis That Looks to the Operating Consequences of Relevant State Law, Rather Than a Mode That Automatically Accepts the State's Characterization of That Law

Whether application of *Simmons* is governed by state law "characterizations" or by a federal court's assessment of state law "consequences" also is a subspecies of a commonplace problem in federal constitutional law that has drawn this Court's repeated attention. Federal constitutional rules frequently turn upon states of affairs that are dependent to some extent on the operation of state law. This Court generally has resolved the problem by looking to the "consequences" of state law rather than the state's own "characterization" of that law.

This has been particularly evident in the area of taxation. In *Stone v. Memphis Steam Laundry Cleaner, Inc.*, 53 So.2d 89, 90 (Miss. 1951), for example, Mississippi's highest court characterized

[14] The Fourth Circuit majority surmised that such a functional analysis of parole eligibility would require courts to apply the rule in *Simmons* whenever a defendant is "unlikely to be paroled." App. 11. This statement confuses a defendant's *eligibility* for parole with speculation about whether the defendant would be found *suitable* for release once he or she came up for consideration. "Parole eligibility . . . simply means consideration for release. Such eligibility does not 'entitle' the prisoner to release even one day earlier than his full term or aggregate consecutive terms." *Chatman-Bey*, 797 F.2d at 991. In Ramdass' view, the basic holding in *Simmons* applies only to defendants who will not have the opportunity to be considered for release during their lifetime — not to defendants who will come up for consideration.

the state's "privilege tax" as "a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and nonresidents alike." This Court, however, looked to the consequences of the tax, not the state's characterization. "The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not "a tax on interstate commerce." *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 392 (1952). Concluding that the effect of the levy was to tax the privilege of doing interstate business, the Court held that it violated the Commerce Clause. *See also Colonial Pipeline Co. Traigle*, 421 U.S. 100, 107-08 (1975) (citing *Memphis Steam Laundry* for proposition that "[t]his Court is, of course, not bound by the state court's determination that the challenged tax is not a tax on interstate commerce.") By the same reasoning, Virginia may define the scope of technical eligibility for parole under state law, but it is the independent obligation of the Article III court to determine whether the consequence of that definition is to deny Ramdass due process of law under the United States Constitution.

The Court similarly emphasized the need to consider state law consequences, rather than merely a state's characterization of its law, in *Bailey v. Alabama*, 219 U.S. 219 (1911). *Bailey* involved a state statute that (i) made it a criminal offense for a laborer to enter into an employment contract with intent to injure or defraud and then, after obtaining a salary advance from the employer, refusing to perform the promised service or return the advance; and (ii) made refusal or failure to perform the service or refund the money prima facie evidence of the requisite intent to injure or defraud. *Id.* at 227-28. Although the state characterized the statute as one that merely punished fraud, this Court concluded that the consequence of the statute was to employ the threat of criminal prosecution as a means of compelling involuntary servitude for mere breach of contract.

> We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Id. at 238. Because of this consequence, the Court held that the statute violated the Thirteenth Amendment. *Id.* at 240-45.

In holding that "parole eligibility is a question of state law and therefore is not cognizable on federal habeas review," App. 12, the Fourth Circuit majority did not simply condone an unreasonable state-court interpretation of *Simmons*. It also misinterpreted *Simmons* itself as involving an exception to the ordinary, well-established principle that federal courts must look behind state-law characterizations to examine the *consequences* of the operation of state legal rules for federal constitutional purposes.

C. Neither 28 U.S.C. § 2254(d)(1), as Amended by AEDPA, Nor the New Rule Doctrine, Precludes the Grant of Federal Habeas Corpus Relief

The Fourth Circuit majority held, in the alternative, that even if it was "persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1)." App. 11. After stating its view that Section 2254(d)(1) is more stringent than the antiretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), the court of appeals concluded that "either under *Teague* or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail." App. 11-12.

Ramdass does not seek an "extension of *Simmons*." His claim is based squarely on the core rule that this Court expressed in *Simmons*. Both the legal standard in *Simmons* and the application of that standard are "clearly established" under this Court's precedents. Specifically, it is clearly

established that a capital defendant is entitled to inform the jury whenever the state seeks death based on future dangerousness and "the only available alternative sentence to death is life without the possibility of parole." *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). Due process prohibits the state from "securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment mean[s] life without parole." *Simmons*, 512 U.S. at 161 (plurality opinion).

Relief is not precluded under 28 U.S.C. § 2254(d)(1) because the state court's decision was contrary to, or involved an unreasonable application of, this clearly established law. To the extent the Fourth Circuit majority concluded otherwise, its determination was infected by the same misinterpretation of Section 2254(d)(1) that was manifest in *Williams (Terry) v. Taylor*, *supra* n.10 In *Williams*, the Fourth Circuit held that under Section 2254(d)(1), a state court's decision to deny federal constitutional claim cannot be "contrary to" clearly established federal law unless it is in square conflict with a decision of this Court that is controlling as to law and fact, and the state court's decision cannot involve "an unreasonable application of" clearly established federal law unless it is predicated on an interpretation or application of relevant precedent that reasonable jurists would *all* agree is unreasonable.

For parallel reasons, Ramdass' claim also is not barred by the new rule doctrine. *Simmons* is not a new rule for Ramdass; it was decided before his conviction became final. Nor has Ramdass asked the Court to extend the *Simmons* rule by applying it in a novel setting. As shown in the following section, the relevant facts in Ramdass' case are nearly identical to those in *Simmons*. Ramdass seeks a straightforward application of the rule that *Simmons* applies when "the only

available alternative sentence to death is life without the possibility of parole." *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). In Ramdass' case, as even the Fourth Circuit acknowledged, everyone except the jury knew that the only alternative sentence to death was life without the possibility of parole.

D. The *Simmons* Court Itself Used a Functional Analysis, and the Facts Demonstrating This Also Show That Ramdass' Case Is Indistinguishable from Simmons' Case on Both the Facts and the Law

Both the plurality and concurring opinions in *Simmons* are based on a functional, practical analysis that eschews state-law technicalities in favor of a realistic view of the probability of future release. Confronted with an argument from South Carolina that Simmons was not technically eligible for parole and that he could, in any event, be released by means other than parole, the plurality dismissed the state's argument as having "little force." *Simmons*, 512 U.S. at 166.

The Virginia Supreme Court and the Fourth Circuit appear to have presumed that Jonathan Simmons was technically ineligible for parole, and that this factual distinction disentitled Ramdass to benefit from the rule in *Simmons*. In truth, however, Simmons had never been declared eligible for parole, and he was only *functionally* ineligible for parole at the time of his trial. Thus, the facts which demonstrate the Court's use of a functional analysis also demonstrate that Ramdass' case is indistinguishable from Simmons' case on the facts and the law.

At the time of Simmons' trial, firmly established South Carolina law vested parole eligibility decisions solely in the Probation, Parole and Pardon Board. *State v. McKay*, 386 S.E.2d 623 (S.C. 1989). Based on this authority, South Carolina represented to this Court that:

> at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). *Accord Williams v. Commonwealth*, *supra*; [*State v.*] *Torrence*, [406 S.E.2d 315], 323 [(1991)] ("there is no way [for the court] to be assured that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]").

Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, at 95-96; 1993 WL 669003 at *95-96 (brackets in original). In other words, Simmons was not technically ineligible for parole under state law *until the parole board said so*, and at the time of his trial there was a possibility that the board would reach a different conclusion than the court on the question of parole eligibility.[15] Although the General Counsel to the Department Corrections testified at Simmons' trial that Simmons would serve a sentence of life without parole, he qualified this testimony, indicating that Simmons would be ineligible for parole only "*assuming* that was the second conviction not related to the first violent offense. . . ." Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 13; 1993 WL 669003 at *13a (emphasis added).

In his reply brief, Simmons acknowledged that Simmons had not yet been found ineligible for parole. "This assertion, though technically true, is irrelevant." Petitioner's Reply Brief in *Simmons v. South Carolina*, No. 92-9059, at 1; 1993 WL 625970 at *1. Simmons called it irrelevant because he believed that he met the statutory criteria for parole ineligibility under S.C. Code § 24-21-640, and that a future declaration to this effect by the parole board would be a mere formality.

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[15] At first blush, it appeared that the murder conviction counted as Simmons' second "strike" — a fact that would have rendered him ineligible for parole under South Carolina law. The parole board might have made a factual finding, however, that the murder was related to the violent crime that constituted Simmons' first "strike." The result of such a finding would be that Simmons was still eligible for parole because offenses that were part of a "continuous course of conduct" could not count as separate "strikes." *See* S.C. Code Ann. § 24-21-640 (1993 Supp.).

At oral argument, counsel for South Carolina did not retreat from the position, expressed in his brief, that Simmons was not technically ineligible for parole until the parole board made the required finding. Transcript of Oral Argument in *Simmons v. South Carolina*, No. 92-9059, at 23-50; 1994 WL 663636 at *23-50 (Jan. 18, 1994).

Discounting South Carolina's make-weight argument that Simmons was not *technically* eligible for parole, this Court considered Simmons' ineligibility for parole to have been conceded. "Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate." *Simmons*, 512 U.S. 166 (plurality opinion). The Court obviously could not have characterized any of South Carolina's statements as an admission of parole ineligibility unless the Court was using a functional, rather than a technical, definition of that term. The Court then quickly disposed of the remainder of South Carolina's equally technical "possibility of release" arguments, e.g., pardon, change of law, or escape: "To the extent that the state opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force." *Id.*, 512 U.S. at 166 (plurality opinion).

For purposes of applying the rule in *Simmons* to Ramdass' case, the fact that a Virginia court had not yet performed the ministerial act of entering judgment on Ramdass' conviction for the Domino's Pizza robbery is of no more consequence than the fact that a South Carolina parole board had not yet determined whether Simmons' offenses were part of a continuous course of conduct. Both acts are the kind of "hypothetical future developments" that the Court dismissed out of hand.

The outcome of these future developments was at least as much a foregone conclusion in Ramdass' case as it was in Simmons' case: everyone except the jury knew that the trial judge presiding over the Domino's Pizza matter was going to make Ramdass ineligible for parole by

performing the ministerial act of entering judgment, *see supra*, n.4; and everyone believed that the South Carolina parole board was going to make Simmons ineligible for parole by finding that the murder and his prior offenses were not part of a continuous course of conduct and that they counted as separate "strikes." No court throughout the present proceedings has quarreled with this conclusion: Ramdass, like Simmons, was not functionally eligible for parole at the time of his trial.

The fact that Simmons was technically eligible for parole, but functionally ineligible for parole, underscores the pragmatic nature of this Court's analysis. It is consistent with the fact that the Court repeatedly and reasonably spoke not just about ineligibility for parole under the strict letter of state law, but also about imprisonment without "the possibility of parole." *See Simmons*, 512 U.S. at 177 (O'Connor, J., concurring) ("I agree that due process requires that the defendant be allowed to [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"); *see also id.* at 162, 165 (plurality opinion). If Jonathan Simmons had a due process right to inform the jury that he was ineligible for parole, even though he was technically still eligible under state law on the date of his sentencing trial, then Bobby Ramdass had the same due process right, even though he was technically still eligible for parole until the Domino's Pizza judge performed the ministerial act of entering judgment.

A functional, realistic assessment of eligibility for constitutional protections is consistent with this Court's analysis of the identical issue in *Simmons*, and with its analysis of closely analogous issues in other cases. To the extent that the Fourth Circuit approved a rigid technical analysis and failed to assess the constitutional consequences of the state's procedural laws, the Fourth Circuit's error is of special and recurring importance. This Court's review is, thus well warranted.

II WHETHER THERE IS A DUE PROCESS RIGHT TO THE ASSISTANCE OF A PSYCHIATRIST IN THE SENTENCING PHASE OF A CAPITAL CASE FOR PURPOSES OTHER THAN REBUTTING PSYCHIATRIC EVIDENCE OF FUTURE DANGEROUSNESS IS A QUESTION OF NATIONAL IMPORTANCE ON WHICH THE COURTS OF APPEALS ARE SPLIT

This Court has repeatedly held that the Fourteenth Amendment requires states to provide indigent criminal defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). *See, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (right to trial transcript for appeal); *Burns v. Ohio*, 360 U.S. 252 (1959) (right to appeal without paying filing fee); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (right to assistance of counsel on first appeal as of right); *see also Little v. Streater*, 452 U.S. 1 (1981) (right in quasi-criminal proceeding to blood grouping tests).

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court affirmed that a psychiatrist can be a "basic tool" within the meaning of the Fourteenth Amendment. It held that the state must assure access to a competent psychiatrist when an indigent defendant "demonstrates that his sanity at the time of the offense is to be a significant factor at trial, . . . [or] when the State presents psychiatric evidence of the defendant's future dangerousness" at a capital sentencing proceeding. *Id.* at 83. Although this holding nominally reflects the particular facts and circumstances presented in *Ake*, the Court also made quite clear the breadth of its ruling by setting out a three-part balancing test for determining whether any "tool" is "important enough to preparation of a defense to require the State to provide" that assistance: "The first [inquiry] is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought,

and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 U.S. at 77.

As shown below, most federal habeas courts to address the issue have concluded that *Ake* is not limited to its facts. The Fourth Circuit, however, as it did in *Williams* (*Terry*) v. *Taylor*, held here that 28 U.S.C. § 2254(d)(1) permits the grant of habeas corpus relief for a claim based on *Ake* only where the petition presents the identical facts and circumstances that were present in *Ake*. In the penalty phase, according to the Fourth Circuit, that means that there is a constitutional right to a mental health expert under *Ake* only when the prosecution has introduced *psychiatric* evidence of future dangerousness. App.14. In that court's view, there is no "clearly established Federal law, as determined by the Supreme Court of the United States," which recognizes an indigent's right to the assistance of a psychiatrist in anything other this precise factual setting. Section 2254(d)(1). The Court should grant certiorari to clarify the well-grounded rule in *Ake* and to address the special and important question of the degree of factual identity required by Section 2254(d)(1).[16]

A. The Fourth Circuit's Reading of *Ake* Conflicts with the Decisions of Most Courts of Appeals That Have Addressed the Issue

In habeas corpus cases similar to Ramdass' case, the courts of appeals have characterized the

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[16] Although great caution must be exercised in drawing inferences from a GVR, the remand of *Bowden v. Francis*, 470 U.S. 1079 (1985), supports the proposition that this Court did not intend to limit *Ake* to its facts. The penalty phase claim in Bowden's habeas petition alleged only "that petitioner was entitled to the assistance of a psychiatrist to present *mitigating evidence*." *Id.* at 1080 (statement of O'Connor, J., dissenting) (emphasis added). Further, the state had not "attempt[ed] to utilize the aggravating circumstance of 'future violence', so therefore, Petitioner was not denied the right to rebut such evidence." Respondent's Brief in Opposition to Certiorari, *Bowden v. Francis*, No. 83-7032, at 10. On remand, Bowden was denied collateral relief because of these factual differences. *See Bowden v. Kemp*, 767 F.2d 761, 764 n.5 (11th Cir. 1985) ("Unlike the sentencing situation in *Ake*, Bowden's prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none). Bowden did not test the scope of *Ake* by asking this Court to review the court of appeals' decision following remand.

core rule in *Ake* in different ways. With one exception, they all read *Ake* as establishing a broader rule than does the Fourth Circuit. The Fourth Circuit is one of only two courts of appeals that employ a narrow, literal reading of *Ake*: in that court's view, an indigent defendant is constitutionally entitled to the assistance of a psychiatrist in the penalty phase of a capital case if and only "if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony." App. 14. The Fourth Circuit rejected Ramdass' allegation regarding Dr. Samenow on the sole ground that there is no clearly established constitutional right to an expert in the penalty phase if the prosecution does not present *psychiatric* evidence of future dangerousness. *Id.*

The Fifth Circuit has read *Ake* in a similarly restrictive manner. In *Goodwin v. Johnson*, 132 F.3d 162 (5th Cir. 1998), the court said that due process entitles an indigent defendant to the appointment of a psychiatric expert "to present rebuttal evidence at sentencing 'when the State present psychiatric evidence of the defendant's future dangerousness.' . . . The state presented no such evidence in this case." *Id.* at 188.

Other circuits, presented with *Ake* claims in habeas corpus petitions, have read the basic holding in *Ake* more broadly. Notwithstanding the antiretroactivity doctrine, the Tenth Circuit repeatedly has held that *Ake* requires "the appointment of a mental health expert to assist the defendant in the penalty phase when the State presents evidence, *psychiatric or otherwise*, concerning the defendant's future dangerousness, and the defendant establishes the likelihood that his mental condition could have been a significant mitigating factor." *Moore v. Reynolds*, 153 F.3d 1086, 1108-09 (10th Cir. 1998) (emphasis added) (quoting *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir 1995), *cert. denied*, 516 U.S. 1123 (1996), in turn citing *Liles v. Saffle*, 945 F.2d 333, 341 (10th Cir. 1991)), *cert. denied*, 119 S. Ct. 1266 (1999).

The *en banc* Eleventh Circuit, in *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), read the core rule in *Ake* even more liberally, dismissing the restrictive view that the constitutional right to a mental health expert arises only when the state argues future dangerousness. "As applied to the penalty phase of a capital case, *Ake* requires a state to provide the capital defendant with such access to a competent psychiatrist upon a preliminary showing to the trial court *that the defendant's mental status is to be a significant factor at sentencing*." *Id.* at 928-29 (emphasis added). The state urged the federal habeas court in *Clisby* to "adopt a narrow reading of *Ake* that would restrict a capital defendant's right to access to a competent psychiatrist for the evaluation, preparation, and presentation of mitigating evidence at sentencing to a case in which the state has introduced expert testimony regarding the defendant's future dangerousness." *Id.* at 929 n.7. The *en banc* Eleventh Circuit declined. "We reject such a categorical limitation of *Ake* 's scope." *Id.*

In *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994), the prosecution had "presented no evidence as to future dangerousness." *Id.* at 1293 n.11. Nonetheless, the Eighth Circuit, like the Eleventh, held in a habeas corpus case that the failure to appoint an independent mental health expert violated the defendant's right to due process. "Like Ake, Starr's mental condition was his only viable defense and his strongest argument in mitigation for sentencing purposes. Thus, Starr's situation falls well within *Ake*'s dictates that a capital defendant whose mental condition is seriously in issue be provided with expert assistance." *Id.* at 1288.

Similarly in *Smith v. McCormick*, 914 F.2d 1153,1157 (9th Cir. 1990), a case in which there was no indication that the prosecution had presented evidence of future dangerousness, the habeas court said that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase."

Finally, in *Terry v. Rees*, 985 F.2d 283 (6th Cir. 1993), the habeas court read *Ake* as establishing a rule that is not limited to the assistance of psychiatrists in particular circumstances, but applies equally to other kinds of forensic experts in other circumstances. Relying solely on *Ake*, the Sixth Circuit concluded that the petitioner "was deprived of the opportunity to present an effective defense when he was denied an independent pathologist in order to challenge the government's position as to the victim's cause of death." *Id.* at 284.

It is worth noting that all of the cases cited above were habeas corpus cases brought under 28 U.S.C. § 2254. All were cases decided after this Court imposed the antiretroactivity doctrine in *Teague*. All were cases where the federal habeas court had to define the scope of the core rule in *Ake*. None, except the Fourth and Fifth Circuits, concluded that the core rule was limited to the unique factual circumstances present in *Ake*, where the prosecution presented psychiatric evidence of future dangerousness. The Court should grant certiorari both to resolve the conflict in the circuits and, on a national scale, to clarify its core hold in *Ake*.

B. The Fourth Circuit Failed To Consider the Substance or the Function of the Balancing Test That Is a Key Component of the Rule in *Ake*

The Fourth Circuit's limited and literal reading of *Ake* wholly ignores the portion of this Court's opinion which sets out the three-part balancing test for determining whether a particular form of assistance is a "basic tool[s] of an adequate defense." *Ake*, 470 U.S. at 77. That test is an essential part of this Court's opinion. By including this test, the Court reasonably signaled that it was announcing "a rule designed for the specific purpose of evaluating a myriad of factual contexts," *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in the judgment). Announcing a rule for decision-making, rather than merely rendering a ruling about a defendant's access to one

specific kind of expert under very specific circumstances, is consistent with the Court's important, overarching role in the judicial system and the Court's limited resources. When a rule is designed to evaluate different factual contexts, "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.*

Under the three-part balancing test, a defendant's interest in presenting psychiatric testimony to rebut future dangerousness is compelling, regardless whether the state's evidence of future dangerousness is psychiatric or nonpsychiatric. The defendant's interest in presenting the jury with truthful information which supports a sentence less than death is equally compelling. No state interest weighs against this right except perhaps its economy — an interest this Court squarely rejected in *Ake*. The probable value of the psychiatric assistance, and the risk of error if such assistance is not offered, also weigh in Ramdass' favor. Psychiatric evidence can show that the defendant is not a future danger, even when the prosecution's case for future dangerousness is not based on psychiatric testimony. It also can show dramatically why the ultimate sentence is not appropriate in a particular case. That is particularly true when half of the state's statutory mitigating factors relate to mental condition. *See* Virginia Code § 19.2-264.3:1.[17]

C. The Clarity of the Rule in *Ake* Was Not Diminished by Passage of AEDPA

Although the Fourth Circuit rejected Ramdass' claim under 28 U.S.C. § 2254(d)(1) rather

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[17] The Fourth Circuit's reading of *Ake* also would have the perverse effect of putting the prosecution in control of the defendant's access to resources. In states like Virginia, where the prosecutor has no pretrial obligation to disclose witnesses or produce expert opinions that have not been reduced to a written report, *see* Virginia Supreme Court Rule 3A:11(b), both the indigent defendant and the trial court may be left in the dark — until the middle of the sentencing trial — about whether the condition precedent exists that entitles the defendant to the assistance of a psychiatrist. Nothing in *Ake* contemplates such a disruptive result.

than under *Teague*, this is a difference without a distinction. In the pre-AEDPA cases cited above, the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits all recognized that the clearly established rule in *Ake* is broader than what the Fourth Circuit has allowed. The clarity of the established rule in *Ake* was not diminished by passage of AEDPA.

Nor has AEDPA meaningfully changed the test for determining whether a rule is "clearly established." Ramdass agrees with the petitioner in *Williams* (*Terry*) *v. Taylor*, that Section 2254(d)(1) essentially codifies the new rule doctrine, and it does not impose a stricter standard. Under Section 2254(d)(1), just as under *Teague*, a federal habeas court's authority to grant Ramdass collateral relief depends on whether *Ake* clearly provides that an indigent defendant is entitled to the assistance of a competent psychiatrist in a capital sentencing trial when the defendant's mental condition is at issue, regardless whether or not the prosecution presents *psychiatric* evidence of future dangerousness.[18]

If, as Ramdass contends, and as the majority of circuits to address the issue have concluded, the basic rule in *Ake* is not narrowly limited to capital cases where the prosecution presents psychiatric evidence of future dangerousness, then the Virginia Supreme Court's decision in this case was contrary to or an unreasonable application of *Ake*, and the Fourth Circuit erred when it failed to grant of the writ.

D. This Case Presents a Good Vehicle for Addressing the Question Presented

This Court has previously declined to consider the scope of an indigent defendant's access to assistance of experts because the defendant failed to make a sufficient showing of need. *See, e.g.,*

[18] In *Rogers v. Gibson*, 173 F.3d 1278, 1285 n.5 (10th Cir. 1999), the court unequivocally reaffirmed its reading of *Ake*. It questioned, but did not decide, whether 28 U.S.C. § 2254(d)(1), as amended by AEDPA, might require it to defer to a state court's contrary interpretation.

Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (declining to consider whether defendant had constitutional right to criminal investigator, fingerprint expert, and ballistics expert because "the requests were accompanied by no showing as to their reasonableness").

Ramdass' case does not suffer from that threshold infirmity. There was no dispute below about the adequacy of Ramdass' request for the assistance of a mental health expert. The state did not oppose Ramdass' pretrial motion, and the trial court expressly granted that motion. Ramdass' case thus presents a good vehicle for review. There is a strong probability that if Ramdass' claim is considered on the merits, he will be entitled to collateral relief. The defendant's right to due process clearly is violated when the state's statutory aggravating and mitigating factors refer to depravity, mental illness, and mitigation, but the trial court appoints a mental health expert who does not believe in mental illness or mitigation. An expert like Dr. Samenow was tantamount to no expert at all.

III THE COURT'S DECISION IN *WILLIAMS v. TAYLOR* MAY BE DISPOSITIVE OF SOME OF THE ISSUES PRESENTED IN THIS PETITION

As Ramdass has discussed above in Sections I(C) and II(C), there is a close relationship between parts of both of the issues presented in this case and the questions about 28 U.S.C. § 2254(d)(1) that are pending before the Court in *Williams* (*Terry*) *v. Taylor*. Although Ramdass believes he has given the Court ample reason to grant his petition for certiorari without waiting for the decision in *Williams*, it would be equally appropriate for the Court to stay consideration of Ramdass' petition pending the decision in *Williams*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, Virginia 23219
(804) 643-6845

*F. Nash Bilisoly
John M. Ryan
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 466-8600

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that one copy of each of the following:

Motion For Leave To Proceed In Forma Pauperis
Application For A Stay Of Execution
Petition For Writ Of Certiorari
Appendix to Petition For Writ of Certiorari

was served by telecopy and/or hand delivery and First Class Mail on counsel for the Respondent, Katherine P. Baldwin, Esq., Assistant Attorney General, Criminal Litigation Section, Commonwealth of Virginia, 900 East Main Street, Richmond, VA 23219 on 11/12/99.

F. Nash Bilisoly

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3) (3)

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
Imminent Execution Scheduled
November 23, 1999

Michele J. Brace, Esq.
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
Suite 510
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

F. Nash Bilisoly, Esq.
Counsel of Record
John M. Ryan, Esq.
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Counsel for Petitioner

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III.

The district court further concluded that appellant was in constructive possession of the gun and drugs when they were discovered in the course of the search of his car. We agree.

[2, 3] A person has constructive possession over contraband when he has ownership, dominion, or control over the contraband itself or over the premises or vehicle in which it was concealed. *See, e.g., United States v. Blue*, 957 F.2d 106, 107 (4th Cir.1992) (*en banc*). In this case, as the district court noted, not only did appellant own the car in which the contraband was concealed, but appellant was the only person in the car when it was stopped, the gun was under a floor mat on the driver's side, and the drugs were located in a compartment to the left of the steering wheel. When taken together, these findings amply support the district court's conclusion that appellant constructively possessed the gun and drugs found during the search.

The judgment of the district court is affirmed.

AFFIRMED

Bobby Lee RAMDASS, Petitioner–Appellee,

v.

Ronald J. ANGELONE, Director, Virginia Department of Corrections, Respondent–Appellant.

Bobby Lee Ramdass, Petitioner–Appellant,

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, Respondent–Appellee.

Nos. 98–30, 98–32.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1999.

Decided Aug. 3, 1999.

Petitioner convicted of capital murder in state court sought habeas corpus relief, after exhausting state appellate and habeas procedures. The United States District Court for the Eastern District of Virginia, Raymond A. Jackson, J., 28 F.Supp.2d 343, granted writ of habeas corpus on one claim. State appealed, and petitioner cross-appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) whether petitioner was parole ineligible, and thus entitled to inform jury of that status, was question of state law; (2) state court's legal determination that petitioner was eligible for parole was not reviewable by federal habeas court; (3) petitioner was not denied assistance of mental health expert; and (4) petitioner was not deprived of effective assistance of counsel.

Affirmed in part and reversed in part.

Murnaghan, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Habeas Corpus ⇐364, 366

Petitioner preserved, for habeas review, his claim that jury in capital murder trial should have been informed of petitioner's alleged parole ineligibility, by raising claim in his first direct appeal to state court, in his direct appeal on remand from the United States Supreme Court, and in his state habeas petition. 28 U.S.C.A. § 2254(b).

2. Constitutional Law ⇐268(2.1, 11)

A defendant in a capital case is entitled, under the due process clause, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and (2) the only available alternative sentence to death is life imprisonment without the possibility of parole. U.S.C.A. Const. Amends. 5, 14.

3. Courts ⇐100(1)

Where Supreme Court decided *Simmons* case, holding that capital defendant may raise issue of parole eligibility at sentencing when prosecution argues "future dangerousness," before petitioner's direct appeal was final, application of *Simmons* to federal habeas petition was not barred on retroactivity grounds.

4. Habeas Corpus ⇐516.1

Parole eligibility for a state conviction is a state law question.

5. Constitutional Law ⇐270(2)

A state trial court must determine the question of whether a capital defendant is entitled to inform the jury of his alleged parole ineligibility, under due process clause, based on whether state law renders that defendant ineligible for parole. U.S.C.A. Const.Amend. 14.

6. Habeas Corpus ⇐505

Even if petitioner's due process right to inform capital jury of his alleged parole ineligibility, where prosecution argued future dangerousness, was determined by practical, rather than legal, parole ineligibility, such rule was not clearly established, as required to obtain federal habeas relief on claim that petitioner was deprived of that right because he was, as a practical matter, ineligible for parole. 28 U.S.C.A. § 2254(d)(1).

7. Habeas Corpus ⇐505

State court's legal determination that defendant was eligible for parole, and was thus not entitled to inform capital jury that he was parole ineligible, was not subject to review by federal habeas court. 28 U.S.C.A. § 2254(a).

8. Habeas Corpus ⇐505

Even if federal habeas court could review state court's legal determination that petitioner was eligible for parole, and was thus not entitled to inform capital jury that he was parole ineligible, state court's determination did not rely on improper form-over-substance interpretation of state's three-strikes statute, despite fact that petitioner would have been parole ineligible if judgment on separate conviction had been entered 19 days earlier. Va. Code 1950, § 53.1–151, subd. B1.

9. Habeas Corpus ⇐385

Petitioner did not preserve, for federal habeas review, his claim that state Supreme Court's interpretation of its parole eligibility statute was so arbitrary as to violate due process, as that court's mere finding that petitioner was parole eligible did not also implicitly encompass conclusion that parole eligibility finding comported with due process. U.S.C.A. Const. Amend. 14; Va.Code 1950, § 53.1–151, subd. B1.

10. Habeas Corpus ⇐381

The standard for state court exhaustion prior to filing a federal habeas petition is not whether a petitioner presented the identical claim in state court but rather whether he fairly presented his federal claim to the state court.

11. Habeas Corpus ⇐383

A claim is "fairly presented" to state court, and thus preserved for federal habeas review, when the petitioner presented to the state courts the substance of his federal habeas corpus claim; the ground relied upon must be presented face-up and squarely, and the federal question must be plainly defined.

See publication Words and Phrases for other judicial constructions and definitions.

12. Habeas Corpus ⇐383

Habeas petitioner preserved substance of his federal claim that he was denied a mental health expert in violation of due process, even though claim appeared in his state habeas petition under heading of ineffective assistance of counsel and subheading of failure to secure a mental health expert. U.S.C.A. Const. Amends. 6, 14.

13. Constitutional Law ⇐268.2(3)
Costs ⇐302.4

Defendant was not denied assistance of mental health expert, in violation of due process, absent showing to trial court that his mental state was at issue in his defense of the charges or that, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. U.S.C.A. Const.Amend. 14.

14. Habeas Corpus ⇐383

Petitioner failed to preserve, for habeas review, claim that state statute providing for assistance of mental health expert was arbitrarily enforced, in violation of due process, because, in his state habeas petition, petitioner stated only that his rights under the state statute had been denied, not that the denial violated his right to due process. U.S.C.A. Const.Amend. 14; Va. Code 1950, § 19.2–264.3:1.

15. Criminal Law ⇐641.13(7)

Trial counsel's alleged failure to object to appointment of particular mental health expert and seek assistance from alternative mental health expert once counsel realized that appointed expert would not be helpful was not ineffective assistance of counsel, as defendant suffered no prejudice thereby, where counsel presented others' testimony during penalty phase in attempt to establish mitigating factors that defendant claimed should have been presented by expert, and defendant could not show reasonable probability that court would have either removed expert upon objection or appointed an additional expert upon request. U.S.C.A. Const.Amend. 6.

ARGUED: Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. F. Nash Bilisoly, IV, Vandeventer Black, L.L.P., Norfolk, Virginia, for Appellee. **ON BRIEF:** Mark J. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. John M. Ryan, Vandeventer Black, L.L.P., Norfolk, Virginia; Michele J. Brace, Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellee.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Murnaghan wrote an opinion concurring in part and dissenting in part.

OPINION

NIEMEYER, Circuit Judge:

A Fairfax County, Virginia court convicted Bobby Lee Ramdass of capital murder and sentenced him to death for the murder of Mohammed Kayani during the robbery of the convenience store where Kayani was a clerk. On Ramdass' petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254, the district court granted the writ and ordered the state court to resentence Ramdass, concluding that the state court had denied Ramdass due process by denying him the opportunity established by *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), to tell the jury during sentencing that he was ineligible for parole. The

district court rejected the other grounds advanced by Ramdass in his petition.

Accepting the Virginia Supreme Court's state law determination that Ramdass was not, at the time of his sentencing proceedings, legally ineligible for parole, we conclude that *Simmons* was not applicable. Accordingly, we reverse the district court's order insofar as it concluded that *Simmons* required the writ to issue. Finding no error in the district court's disposition of the other issues, we affirm the remaining portion of the district court's order.

I

The facts of Kayani's murder are related by the Virginia Supreme Court as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7–Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7–Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7–Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.
>
> When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?"
>
> After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."
>
> Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass v. Commonwealth ("*Ramdass I*"), 246 Va. 413, 437 S.E.2d 566, 568–69 (1993) (footnote omitted). Following indictment and a trial, a Fairfax County jury found Ramdass guilty of capital murder in the commission of armed robbery as well as illegal use of a firearm. Ramdass had earlier pled guilty to one count of robbery.

At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society"—the "future dangerousness" predicate for imposition of the death penalty. *See* Va.Code Ann. § 19.2–264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."

During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern [them]selves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three-strikes provision.[1] *See* Va.Code Ann. § 53.1–151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

1. Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is *ineligible* for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va.Code Ann. § 53.1–151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18–year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks *after* the jury in this case concluded its sentencing deliberations.

On direct appeal to the Virginia Supreme Court, Ramdass argued, *inter alia*, that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge prevented him from telling the jury that he was parole ineligible, a potentially mitigating factor. Rejecting that argument, the Virginia Supreme Court stated that Ramdass had advanced "no persuasive reason" to modify prior Virginia precedent holding that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass I*, 437 S.E.2d at 573 (citing *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379, 392 (1993)).

From that court's decision, Ramdass filed a petition for writ of certiorari with the United States Supreme Court. While that petition was pending, the United States Supreme Court decided *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), holding that when a prosecutor argues future dangerousness to a capital sentencing jury, a defendant who is parole ineligible has a due process right to respond to that argument by informing the jury, through argument or instruction, of his ineligibility for parole. After deciding *Simmons*, the Supreme Court granted Ramdass' petition for certiorari and remanded his case to the Virginia Supreme Court for reconsideration in light of *Simmons*. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

On remand, Ramdass asserted that because he was ineligible for parole under Virginia's three-strikes statute, *Simmons* applied to his case and required that he be allowed to "meet the state's case against him" by informing the jury of his parole ineligibility. The Virginia Supreme Court, however, reaffirmed Ramdass' death sentence, concluding that the holding of *Simmons* was not implicated. Noting that *Simmons* applies "only if Ramdass was ineligible for parole when the jury was considering his sentence," the Virginia Supreme Court determined that Ramdass was "not ineligible for parole since he had only two separate felony offenses within the meaning of [the three-strikes provision]." *Ramdass v. Commonwealth* ("*Ramdass II*"), 248 Va. 518, 450 S.E.2d 360, 361 (1994) (internal quotation marks omitted). While recognizing the Pizza Hut conviction and the Kayani murder conviction as predicate offenses under the three-strikes statute, the court rejected Ramdass' argument that the January 7, 1993 jury verdict of guilty in the Domino's Pizza robbery was also a predicate conviction because "[j]udgment had not been entered on that verdict." *Id.* Accordingly, the court stated, "it cannot be considered as a conviction" under the three-strikes provision. *Id.* (citing *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707, 709 (1922)).

Pursuing state post-conviction relief, Ramdass again asserted in his state habeas petition that *Simmons* required that the jury be accurately informed as to his parole eligibility status, although he did not specifically challenge the Virginia Supreme Court's determination in *Ramdass II* that under Virginia law he was not ineligible for parole. Ramdass also claimed that his trial counsel were constitutionally ineffective for, *inter alia*, failing to investigate and to object to the appointment of Dr. Stanton Samenow as his mental health expert because Dr. Samenow was "notoriously pro–prosecution" and refused to work with the defense. In arguing the ineffective assistance of counsel, Ramdass stated also that he was denied the reasonable assistance of a mental health expert at trial, in violation of both *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that in limited circumstances, a criminal defendant has a Fourteenth Amendment right to access to a competent psychiatrist) and Virginia Code § 19.2–264.3:1 (entitling indigent capital defendants to the assistance of a mental health expert). The Virginia Supreme Court dismissed the petition. It ruled that

Ramdass' *Simmons* claim was barred from review under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) (holding that an issue previously decided against the petitioner on direct appeal may not again be considered on post-conviction review), and it summarily rejected Ramdass' ineffective assistance of counsel claim.

Seeking habeas relief in the federal courts, Ramdass filed this petition in February 1997, alleging, among other things, unconstitutional error in the trial court's failure to allow the jury to consider his alleged parole ineligibility. He also claimed that trial counsel were constitutionally ineffective for failing to investigate the views and reputation of Dr. Samenow, for failing to object to his appointment, and for failing to seek alternative mental health testimony. Finally, he alleged that his Fourteenth Amendment right to the assistance of a mental health expert had been violated, either under *Ake* or by deprivation of a state-created right to such assistance provided in Va.Code Ann. § 19.2–264.3:1. The district court granted Ramdass a writ of habeas corpus based on the *Simmons* claim, dismissed the remaining claims, and ordered the state trial court to resentence him. *See Ramdass v. Angelone*, 28 F.Supp.2d 343, 356–74 (E.D.Va.1998). From the district court's order, the Commonwealth of Virginia appealed to challenge the *Simmons* ruling, and Ramdass cross-appealed to preserve his claim on various other grounds rejected by the district court.

II

In its appeal, the Commonwealth of Virginia raises two issues: (1) that the *Simmons* claim was defaulted because it was not properly raised in state court, and (2) that Ramdass is, in any case, not entitled to relief under *Simmons* because, had he been sentenced to life imprisonment, he would not have been parole ineligible under Virginia law.

[1] The Commonwealth's first point—that Ramdass failed to preserve his *Simmons* claim by raising it in state court as required by 28 U.S.C. § 2254(b) (barring federal courts from entertaining habeas petitions from individuals who have not exhausted their state court remedies)—does not merit an extended discussion. Prior to filing his federal habeas petition, Ramdass raised his core *Simmons* claim—that due process entitled him to inform the jury that he was ineligible for parole—to the Virginia Supreme Court on at least three separate occasions: in his first direct appeal, in his direct appeal on remand from the United States Supreme Court, and in his state habeas petition. Indeed, the most compelling evidence that Ramdass did not default his *Simmons* claim is the fact that the Virginia Supreme Court disposed of that claim by declaring it barred from review on state habeas by the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), which proscribes the relitigation of claims that have *already been adjudicated on the merits* in state court on direct appeal.

While it is true, as the Commonwealth points out, that Ramdass did not specifically contest the parole eligibility determination in his state habeas petition, he did assert the broader, more basic claim, which he had made all along, that the trial court's refusal to give the jury that information on his request violated his constitutional right to due process. We believe that the Commonwealth's characterization of Ramdass' *Simmons* claim for this purpose is unduly narrow. Accordingly, we conclude that the district court did not err in finding that the *Simmons* claim was not defaulted. We now turn to the merits.[2]

2. The Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing the applicable standard of review, provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

A

Understanding first the precise rule in *Simmons* will aid our analysis of Ramdass' claims. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the prosecutor had argued to the jury during the penalty phase of trial that the death sentence was appropriate because Simmons, who had assaulted and killed several elderly women, was a future danger to society. To rebut this argument, Simmons contended that because he was only a threat to elderly women, none of whom he would ever encounter in prison, he did not pose such a danger. He proffered evidence that he was legally ineligible for parole and requested an instruction to the jury that if sentenced to life imprisonment, he would remain imprisoned "for the balance of his natural life." *Id.* at 160, 114 S.Ct. 2187. The trial court denied Simmons' request to inform the jury, either by argument or instruction, of his ineligibility for parole under South Carolina law. The United States Supreme Court ruled that this denied Simmons due process as guaranteed by the Fourteenth Amendment. *Id.* at 156, 171, 114 S.Ct. 2187 (Blackmun, J., plurality opinion); *id.* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring). We recognize Justice O'Connor's concurrence as the controlling opinion in *Simmons* because it represents the narrowest grounds upon which a majority of the Court agreed. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, — U.S. —, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995); *see also O'Dell v. Netherland*, 521 U.S. 151, 158, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

Writing for the plurality, Justice Blackmun held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187. When the jury lacks such information, the plurality noted, there is a real danger that the state will "succeed[ ] in securing a death sentence on the ground, at least in part, of ... future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.* at 162, 114 S.Ct. 2187.

In her concurrence, Justice O'Connor recognized that when a state prosecutor argues future dangerousness to the jury, the defendant's only opportunity to rebut that argument will often be by telling the jury that "he will never be released from prison." *Id.* at 177, 114 S.Ct. 2187. Justice O'Connor went on to conclude that

> in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id.

[2] Accordingly, the grounds on which both the plurality and Justice O'Connor agree are summarized in *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir.1995):

> *Simmons* does not hold, as the plurality opinion at one point put it, that "due process requires that the sentencing jury be informed that the defendant is parole ineligible," *id.* at [156, 114 S.Ct. 2187] (plurality opinion). It only holds more narrowly that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible." *Id.* at [177, 114 S.Ct. 2187] (O'Connor, J.).... Put in terms familiar from philosophical and jurisprudential debates over the proper meaning of "equality" and "equal protection," the defendant's right, under *Simmons*, is one of opportunity, not of result.

In short, a defendant in a capital case is constitutionally entitled, under *Simmons*, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and (2) the only available alternative sentence to death is life imprisonment without the possibility of parole.

[3] It is undisputed in this case that Ramdass meets the first requirement. The prosecutor at Ramdass' sentencing proceeding argued that the death penalty was necessary solely because Ramdass was a future danger to society. Whether Ramdass meets the second requirement is the principal source of dispute in the appeal before us.[3] Resolution of this issue depends on how *Simmons* defines parole ineligibility and whether, under the standards for making that determination, Ramdass was ineligible for parole at the time of the penalty phase of trial.

B

In *Ramdass II*, the Virginia Supreme Court held that *Simmons* did not apply to Ramdass' case because *Simmons* required *legal* ineligibility for parole and Ramdass was not ineligible for parole under Virginia law. The Court concluded that if sentenced to life imprisonment on the Kayani murder, Ramdass would not have been "convicted of three separate felony offenses" of murder, rape, or armed robbery as required for parole ineligibility under Virginia's three-strikes statute. Va.Code Ann. § 53.1-151(B1). According to the court, Ramdass' qualifying convictions at the time were (1) the Pizza Hut armed robbery conviction, upon which judgment had been entered, and (2) the Kayani murder conviction. The court acknowledged that a jury had also returned a verdict finding Ramdass guilty of armed robbery in the Domino's Pizza incident. But, relying on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922), which held that conviction does not occur until judgment is entered, the court concluded that the Domino's Pizza robbery could not be counted as the third strike under the Virginia statute because the court had not entered judgment on that guilty verdict at the time that the jury in this case was deliberating Ramdass' sentence. *See Ramdass II*, 450 S.E.2d at 361.

proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

3. It is undisputed that the Supreme Court decided *Simmons before* Ramdass' direct appeal was final. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994) (granting Ramdass' petition for certiorari on direct appeal and remanding to the Virginia Supreme Court for reconsideration in light of *Simmons*); *cf. O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (declaring that *Simmons* announced a "new rule" under *Teague* for all *already final* convictions). Accordingly, the anti-retroactivity component of § 2254(d) would not bar application of *Simmons* to Ramdass' habeas petition on retroactivity grounds if *Simmons* is otherwise applicable as a matter of substantive law.

Ramdass contends that the Virginia Supreme Court misconstrued *Simmons* as requiring a *state law* determination of parole ineligibility rather than "the functional and common-sense [im]possibility of parole" as the trigger for the right to inform the jury of parole ineligibility. Moreover, even if state law governs the parole ineligibility determination for purposes of applying *Simmons*, Ramdass, in substance, accuses the Virginia Supreme Court of attempting to avoid the application of *Simmons* by adopting a novel and highly technical definition of "convicted" in the three-strikes provision. Further, Ramdass maintains that even if a conviction requires the entry of judgment, as *Ramdass II* held, the Domino's Pizza guilty verdict should count as a conviction because the entry of judgment was nondiscretionary, purely ministerial, and legally insignificant. In short, Ramdass argues for a pragmatic, functional, nonlegalistic concept of when a defendant is ineligible for parole.

[4, 5] Because Ramdass advances an erroneous interpretation of *Simmons*, we must begin by turning to *Simmons* itself. *Simmons* grants capital defendants a due process right in state trials to advise a jury of parole ineligibility only when the only alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole. That condition cannot be a general question of practicality determined by a federal habeas court, as Ramdass argues. Parole eligibility is a state law question. Under *Simmons*, only those capital defendants who are parole ineligible *under state law* at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment. In other words, a trial court must determine the question of whether *Simmons* applies to a particular defendant based on whether *state law* renders that defendant ineligible for parole. *See Simmons*, 512 U.S. at 156, 114 S.Ct. 2187 (Blackmun, J., plurality opinion) (limiting the holding to situations where "state law prohibits the defendant's release on parole"); *id.* at 176, 114 S.Ct. 2187 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that for Simmons "the only available alternative sentence to death ... was life imprisonment without the possibility of parole").

When Ramdass argues that *Simmons'* applicability is not conditioned on "a state's determination of 'parole ineligibility' at the moment of capital sentencing" but rather on a nonlegalistic "common-sense [im]possibility of parole," he advances a new interpretation of *Simmons* that is simply incompatible with the logic of *Simmons* itself. In relying on Justice O'Connor's statement that *Simmons* applies in "cases in which the only available alternative sentence to death ... is life imprisonment without possibility of parole," *id.* at 177, 114 S.Ct. 2187, to argue that a federal, functional standard applies to parole ineligibility determinations, Ramdass ignores the *Simmons* plurality's repeated reference to state law as the determining factor for whether or not a defendant is ineligible for parole. *See, e.g., id.* at 156, 114 S.Ct. 2187 ("We hold that where the defendant's future dangerousness is at issue, and *state law* prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible" (emphasis added)); *id.* at 165, 114 S.Ct. 2187 (observing that the defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was *legally* ineligible for parole" (emphasis added)); *id.* at 165 n. 5, 114 S.Ct. 2187 ("The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole *under state law*" (emphasis added)). Moreover, his reliance on Justice O'Connor's language is also misplaced. Ramdass' interpretation not only reads too much into Justice O'Connor's phraseology, but it also

takes the phrase out of context. Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality and believed that the parole eligibility determination was governed by anything other than state law. On the contrary, she cited state law to show that Simmons himself was ineligible for parole, *see id.* at 176, 114 S.Ct. 2187, and she concluded that Simmons was entitled to communicate his parole ineligibility to the jury because "the only alternative sentence to death *under state law* was life imprisonment without possibility of parole," *id.* at 178, 114 S.Ct. 2187 (emphasis added). *See also id.* at 176, 114 S.Ct. 2187 ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact").

In addition, Ramdass' argument for equating legal parole ineligibility with a common-sense impossibility of parole is at odds with case law from this circuit. Under Ramdass' theory, defendants who are, as a practical matter, unlikely to be paroled—perhaps because a state only rarely grants parole or because the defendant would be over a hundred years old when finally legally eligible—would be entitled to a *Simmons* instruction. Yet, we have consistently refused to apply *Simmons* to cases in which the defendants were not legally ineligible for parole at the time of sentencing. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999) (refusing to extend *Simmons* to apply to a defendant who would not become eligible for parole for twenty-five years, under state law); *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998) (holding that "[s]ince Keel would have been eligible for parole had he not been sentenced to death, [citing state law], he is not entitled to any relief under our current interpretation of *Simmons*"), *cert. denied*, — U.S. ——, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.) (declining to apply *Simmons* after Virginia Supreme Court determined defendant was not ineligible for parole under the three strikes statute because his convictions arose out of the same transaction), *cert. denied*, — U.S. ——, 119 S.Ct. 389, 142 L.Ed.2d 321 (1998).

Finally, as a matter of simple logic, the *fact* that a defendant will have no possibility of parole if given a life sentence can only stem from the *legal conclusion* that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

[6] Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1). *Cf. Keel*, 162 F.3d at 269. This statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal *habeas* law." *Green v. French*, 143 F.3d 865, 873 (4th Cir.1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n. 9 (4th Cir.1999); *see also Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir.1999) (noting that § 2254(d)(1) "closes the escape hatches in *Teague*").[4] Thus, either under *Teague* or under § 2254(d)(1),

4. In fact, § 2254(d)(1) can be seen as stricter in that it does not recognize *Teague*'s two traditional exceptions which permit retroactive application of new rules which either "place[ ] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or are "watershed rules of criminal procedure." *See Green*, 143 F.3d at 873 (quoting *Teague*, 489 U.S. at 311–12, 109 S.Ct. 1060).

Ramdass' argument for an extension of *Simmons* would fail.

C

[7] Having determined that *Simmons* applies only to a capital defendant who, under state law, is legally ineligible for parole at the time of sentencing, we turn to the question of whether Ramdass meets this threshold requirement. The Virginia Supreme Court held that, under the three-strikes statute, he did not. *See Ramdass II*, 450 S.E.2d at 361. The district court held that the state court's conclusion was an unreasonable determination of fact. *See Ramdass v. Angelone*, 28 F.Supp.2d at 365.

As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. *See Fitzgerald*, 150 F.3d at 367 (citing *Fitzgerald v. Commonwealth*, 249 Va. 299, 455 S.E.2d 506, 510 (1995)). Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

More significantly, parole eligibility is a question of *state* law and therefore is not cognizable on federal habeas review. The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

[8] Even if we were not so constrained, however, we would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim. At most, Ramdass can complain about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge—the Kayani murder—first, in which case he would have had *only one* qualifying conviction at the time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

Second, Ramdass characterizes the Virginia Supreme Court's reliance on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922) (discussing the meaning of the term "conviction" in the context of a statute removing public officials from office upon conviction of crimes of moral turpitude), as a judicial version of grasping at straws. Yet, sound reasoning supports *Smith's* holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith's* factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment—even if it appears to be only a formal step of the process—in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural

protection against unfairness or corruption.

Third, Ramdass attempts to portray the *Smith* decision as an irrelevant relic. While the Virginia Supreme Court had not cited this case in a published opinion since the 1920s, the intermediate appellate court has observed that "Virginia courts have defined the word 'convicted' in accordance with *Smith*, but only in the context of a defendant who has been confronted with some type of forfeiture." *Fields v. Commonwealth*, 5 Va.App. 229, 361 S.E.2d 359, 362 (1987) (purporting to limit *Smith* to its facts). As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the *Smith* definition of conviction is appropriate, or even necessary. Upon amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury. Finally, the fact that the Virginia Supreme Court has remanded for re-sentencing upon finding a *Simmons* violation in another case defeats the implication that the Virginia Supreme Court is somehow hostile to enforcing the *Simmons* right. *See Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

We have included this discussion only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim. In the end, however, we reiterate that this dispute about the meaning of the Virginia three-strikes statute is wholly a question of state law that cannot provide the basis for a federal court to grant the writ of habeas corpus. *See* 28 U.S.C. § 2254(a).

III

On his cross-appeal, Ramdass contends that the district court erred in dismissing, either as defaulted or meritless, the following four other claims in support of his habeas petition: (1) the Virginia Supreme Court's determination that he was eligible for parole as of the time of sentencing under Virginia law was so arbitrary as to violate due process; (2) the denial of access to assistance from a mental health expert violated his right to due process; (3) the ineffective assistance of counsel denied him the constitutional right to counsel; and (4) the denial of funds for expert assistance and an evidentiary hearing violated his right to due process. We address these claims in order.

A

[9] First, Ramdass claims that the Virginia Supreme Court's interpretation of the three-strikes provision was so inconsistent with Virginia precedent and so arbitrary that it violated due process. In response to the Commonwealth's contention that this claim was defaulted by failure to raise it in state court, he argues that it could not have been defaulted because the Virginia Supreme Court in fact addressed it simply by concluding that he was parole eligible under Virginia law. This argument, however, proves too much. Carried to its logical conclusion, Ramdass' argument would mean that every judicial ruling carries with it an implicit, due process rubber-stamp. There is no evidence that the Virginia Supreme Court's parole eligibility determination silently encompassed an additional conclusion that the parole eligibility finding itself comported with due process. Because, as Ramdass concedes, ineffective assistance of state habeas counsel will not show cause for his default, *see Mackall v. Angelone*, 131 F.3d 442, 446–49 (4th Cir.1997), we have no power to reach the merits of this independent due process claim on federal habeas. *See* 28 U.S.C. § 2254(b)(1)(A). In any event, we would reject the claim on the merits for the reasons given in our discussion in Part II(C), above.

B

Ramdass next challenges the district court's rejection of his claims that he was

illegally denied the assistance of a mental health expert based on two, separate theories: (1) the due process right to access to a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (2) the due process right to non-arbitrary enforcement of Virginia Code § 19.2–264.3:1, which grants capital defendants the assistance of a mental health expert. Although the district court did not distinguish between these two arguments, holding that they were defaulted, we conclude (1) that the *Ake* claim was preserved but that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing it, and (2) that the claim based on the arbitrary enforcement of state law was defaulted.

[10, 11] The standard for state court exhaustion prior to filing a federal habeas petition is not, as the Commonwealth suggests, whether a petitioner presented the "identical" claim in state court but rather whether he "fairly presented" his federal claim to the state court. "A claim is fairly presented when the petitioner presented to the state courts the *substance* of his federal habeas corpus claim. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (emphasis added and internal quotation marks and citations omitted).

[12] Under this standard, Ramdass did include in his state habeas petition at least the "substance" of his federal claim that he was denied a mental health expert in violation of due process under *Ake*. Even though the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on the seminal Supreme Court case, *Ake*. He summarized the holding of *Ake* and alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. Even so, the Virginia Supreme Court dismissed this claim, finding that it had no merit. In doing so, the Virginia Supreme Court did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d).

[13] *Ake* provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82–83, 105 S.Ct. 1087 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when *the State presents psychiatric evidence* of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

[14] The due process claim for the arbitrary enforcement of a state statute was defaulted because, in his state habeas petition, Ramdass stated only that his rights under the state statute had been denied. This is no more than a state law question. Ramdass did not make the further argument, necessary to make the claim cognizable on federal habeas review, that this denial constituted a violation of his right to due process under the Fourteenth Amendment. *See* 28 U.S.C. § 2254(a).

C

[15] In support of his ineffective assistance of counsel claim, Ramdass argues that his trial counsel were deficient in failing to object to Dr. Samenow's appointment and in failing to seek assistance from an alternative mental health expert once they realized that Dr. Samenow would not be helpful. We conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing this claim for lack of merit. *See* 28 U.S.C. § 2254(d).

To prevail on his ineffective assistance of counsel claim, Ramdass must meet two well-established requirements. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is a difficult showing to make because in assessing the reasonableness of counsel's course of action, "[o]ur review ... is highly deferential" to counsel. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.1998) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court, assuming *arguendo* that Ramdass could satisfy the deficiency prong of *Strickland*, ruled that Ramdass's ineffective assistance claim failed because he could show no prejudice. *See Ramdass*, 28 F.Supp.2d at 370. We agree.

Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither *Ake*, 470 U.S. at 83, 105 S.Ct. 1087, nor Virginia Code § 19.2–264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by *Strickland*, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

D

On Ramdass' final point, we conclude that, because Ramdass failed to make out a prima facie case as to his mental health expert and ineffective assistance claims, the district court did not err in denying Ramdass funds for expert assistance or an evidentiary hearing.

IV

In sum, we reverse the district court's decision to grant Bobby Lee Ramdass' petition for a writ of habeas corpus based upon a *Simmons* violation. Because *Simmons* is limited to situations where state law renders the defendant legally, not merely practically, ineligible for parole, we conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law when it ruled that *Simmons* did not apply to Ramdass' case because Ramdass was not ineligible for parole under Virginia law. In addition, we affirm the district court's opinion as to the remaining issues raised by Ramdass on cross-appeal. The judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's handling of most of the issues raised by Ramdass.[1] I respectfully dissent, however, from the majority's treatment of Ramdass' *Simmons* claim. Because it seems evident

1. I note that I concur only in the judgment on the *Ake* claim. *Ake* provides that under certain circumstances "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Ramdass presented ample evidence to show that Dr. Stanton Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination. Dr. Samenow has pub-

that Ramdass should be able to inform the jury, by argument or court instruction, of his non-eligibility for parole if sentenced for life imprisonment, I would affirm the district court on the *Simmons* claim so that the sentencing jury could be accurately informed that Ramdass would be parole ineligible.

I.

A clear statement of the factual context of this case is useful to gain an understanding of the arbitrariness of the result reached by the majority.

The jury found Ramdass guilty of the Kayani murder on January 28, 1993. His sentencing hearing began the next day. At that hearing, the prosecution presented as evidence of Ramdass' future dangerousness the fact that he had been found guilty of the Pizza Hut robbery, *see infra*, and the Domino's Pizza robbery, *see infra*. The Commonwealth also emphasized that previously Ramdass had committed crimes

licly stated that criminals are a "different breed of person," (J.A. at 347), who seek to manipulate the system for their own ends. He has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that "[m]ost diagnoses of mental illness [in criminals] resulted from the criminal's fabrications." (J.A. at 348.) Dr. Samenow's published works state that circumstances have nothing to do with criminal violations and that "providing the criminal with an opportunity to present excuses deferred him and us further and further from change." (J.A. at 348.) According to a report submitted to the district court by Dr. Reuben Koller, Dr. Samenow's views obviate his ability to evaluate mitigating factors relating to the history or character of a criminal defendant "because he is of the opinion that no mitigating factors can exist." (J.A. at 474.) Even if Dr. Samenow were to abandon his public beliefs and identify mitigating factors, his testimony would be subject to damaging impeachment on cross-examination from his own publicly expressed views. In fact, the record shows that just that happened at another capital sentencing trial. Further, Dr. Koller opined that Dr. Samenow's examination of Ramdass was "incomplete, deficient and inadequate according to conventional psychological standards." (*Id.*) Dr. Koller's preliminary evaluation of the records available to Dr. Samenow indicated seven specific factors ignored by Dr. Samenow which could be considered significant factors in mitigation. It is also worth noting that Dr. Samenow has been at the center of at least two other constitutional challenges. *See Swann v. Taylor*, 173 F.3d 425, 1999 WL 92435, at *6–*9 (4th Cir.1999) (unpublished table disposition) (claiming *Ake* violation); *Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir.1998) (claiming ineffective assistance of counsel for using Dr. Samenow).

We have suggested that *Ake* requires only an expert and an examination, *see Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998), not a competent expert and an appropriate examination, *but see id.* at 409 (Michael, J., concurring) (noting that the *Wilson* majority did not squarely reject the right to an appropriate examination). I agree that *Ake* does not require "effective assistance of a psychiatric expert." *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1573 n. 12 (4th Cir.1993). In my view, though, the Supreme Court requires more than just a warm body with a prefix attached to his name; *Ake* provides a right to a "competent expert" and an "appropriate examination." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. (I note that competence and appropriateness, based on objective professional criteria, are entirely different than effectiveness).

Ultimately, however, Ramdass' *Ake* claim must fail. On direct appeal I would follow the Tenth Circuit and hold that *Ake* applies when the state presents any evidence on future dangerousness and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor. *See Castro v. Oklahoma*, 71 F.3d 1502, 1513 (10th Cir.1995); *Liles v. Saffle*, 945 F.2d 333, 340–41 (10th Cir.1991). *Compare Tuggle v. Netherland*, 79 F.3d 1386, 1387–88 (4th Cir.1996) (describing the *Ake* right as arising when the prosecution first presents psychiatric testimony), *with Swann*, 173 F.3d 425, 1999 WL 92435, at *2 (stating *Ake* applies "when a capital defendant's future dangerousness is to be a significant factor at the penalty phase of the trial"). Constrained by the Anti-Terrorism and Effective Death Penalty Act of 1996 amendments to 28 U.S.C.A. § 2254(d)(1) (West Supp.1999), however, I believe that *Ake*'s application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court. *Cf. Rogers v. Gibson*, 173 F.3d 1278, 1285 n. 5 (10th Cir. 1999) (stating that it is doubtful that applying *Ake* when state has not presented psychiatric evidence of future dangerousness is clearly established by the Supreme Court).

while released on "mandatory" parole. While deliberating Ramdass' sentence, the jury asked the judge, "if the Defendant is given life is there a *possibility* of parole at some point before his natural death?" (emphasis added). Rather than answering that question, the judge told the jury that they were "not to concern [themselves] with what may happen" after they impose his sentence. On January 30, 1993, the jury imposed a sentence of death.

On appeal, the Supreme Court ordered the Virginia Supreme Court to reconsider Ramdass' case in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). *Simmons* involved facts almost identical to those at bar. In *Simmons*, a defendant was made parole ineligible by a conviction for capital murder. At the sentencing phase for that crime, the defendant requested that the jury be instructed that a life sentence would not carry with it the possibility of parole. To bolster his position, the defendant cited, *inter alia*, a study indicating that more than 75 percent of those surveyed in South Carolina considered the amount of time a defendant would actually have to spend in prison to be an "extremely important" or "very important" factor in choosing between life and death. *Simmons*, 512 U.S. at 159, 114 S.Ct. 2187. As in the case at bar, during deliberations, the jury asked the judge a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160, 114 S.Ct. 2187. The trial judge gave a vague answer and instructed the jury not to consider parole in reaching its verdict. *Id.* Within minutes, the jury returned a sentence of death.

On remand in the case at bar, the Virginia Supreme Court held that *Simmons* was inapplicable because under Virginia law, Ramdass was not technically parole ineligible at the time the jury was deliberating his capital sentence. Under Virginia law, a felon is parole ineligible if he has been "convicted" of three offenses of murder, rape, or robbery with a deadly weapon (a "predicate conviction"); when multiple predicate convictions are part of a common act, transaction, or scheme, they are counted as only one predicate conviction. *See* Va.Code Ann. § 53.1–151(B1) (Michie 1998) (the "three strikes law").

At the time the capital jury was considering his sentence, Ramdass had been found guilty of five robberies and one murder.[2] One of the robberies involved no deadly weapon and therefore was not a predicate conviction. Two of the other robberies were part of the same transaction. On December 15, 1992, a jury had found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Pizza Hut robbery"). Judgment and sentence for this crime was officially imposed on January 22, 1993. At the time that Ramdass was sentenced on the Kayani murder, this conviction was still subject to a motion to set aside the verdict for trial error or insufficiency of the evidence. *See* Va. Sup. Ct. R. 3A:15(b) (Michie 1998). It was also subject to an appeal. *See* Va.Code Ann. § 17–116.05:3 (Michie 1996). The Virginia Supreme Court counted the Pizza Hut robbery as only one predicate conviction.

The final two armed robberies were also part of one transaction. On January 7, 1993, in a separate proceeding, a jury found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Domino's Pizza robbery"). Judgment and sentence on this crime was not officially imposed until February 18, 1993. The Virginia Supreme Court reasoned that the Domino's Pizza robbery did not count as a predicate conviction because at the time of the Kayani sentencing, Ramdass had not yet been "convicted" of that offense under the meaning of that term in

2. He was also awaiting trial on two other armed robberies, both involving assault with a deadly weapon.

the three strikes law—although he had been found guilty, judgment had not yet been officially entered. With only one predicate conviction besides the Kayani murder, the Virginia Supreme Court held that *Simmons* was inapplicable because on January 30, 1993 Ramdass was technically eligible for parole.

While this result is sound under the legal technicalities of Virginia law, in practical reality it was a certainty that Ramdass would be parole ineligible upon entry of the Kayani conviction. Indeed, at the Kayani sentencing, there was no practical difference between the Domino's Pizza robbery guilty verdict and the Pizza Hut robbery guilty verdict. From January 30, 1993 until February 18, 1993, no motions were outstanding which could have affected the Domino's Pizza conviction. Ramdass claims that as of January 30, 1993, his motion to strike the evidence as insufficient as a matter of law in the Domino's Pizza robbery case, *see* Va. Sup.Ct. R. 3A:15(a), had already been denied. So, except for the ministerial act of formally entering judgment, on January 30, 1993, Ramdass was in exactly the same position vis-a-vis the Domino's Pizza robbery as he was vis-a-vis the Pizza Hut robbery: the finding of guilt was subject only to a Rule 3A:15(b) motion to set aside the verdict and an appeal under Virginia Code § 17–116.05:3.[3] Thus, although it was a virtual certainty at his capital sentencing that Ramdass would be ineligible for parole, the Virginia Supreme Court found that *Simmons* was not applicable because Ramdass was still in some technical legal sense eligible for parole.

Nineteen days after the jury delivered Ramdass' sentence for the Kayani murder, the ministerial act of entering judgment on the Domino's Pizza robbery was completed, giving Ramdass his second predicate conviction. The Kayani sentence and judgment was officially imposed on April 6, 1993—more than one month after formal entry of judgments on the Pizza Hut robbery and the Domino's Pizza robbery. When judgment for the Kayani murder was entered, that judgment, combined with the Pizza Hut conviction and the Domino's Pizza conviction gave Ramdass his third strike, making him ineligible for parole. This was exactly the occurrence of which Ramdass had requested the jury be informed.

II.

The majority takes the view that the Virginia Supreme Court's interpretation of Virginia law settles the case. I disagree. There is no doubt that the Virginia Supreme Court was entitled to interpret the word "convicted" in Virginia Code § 53.1–151(A) in the way it did. Further, we are bound by this interpretation of state law by the highest state court. This case does not hinge on the word "convicted" in Virginia law, however. The case hinges upon the requirements of the Due Process clause of the Fourteenth Amendment. In *Simmons*, the Supreme Court defined one aspect of this Due Process clause. Admittedly, the right recognized in *Simmons* is dependent to some extent upon state law: The right depends upon state parole law; the right only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right, nonetheless, and the scope and parameter of the *Simmons* right is a matter of federal constitutional law.

The majority rejects a "pragmatic, functional, nonlegalistic concept" of the *Simmons* right. I think the majority has overlooked the genesis of *Simmons*. *Simmons* was merely an extension of the rule in

3. The Commonwealth also points out that under Va.Code Ann. §§ 19.2–298 and 303 (Michie 1995), the court could suspend the imposition of the sentence or suspend the sentence in whole or in part. This is irrelevant, however, for two reasons. First, the Pizza Hut robbery was also subject to a § 19.2–303 suspension of the sentence. Second, regardless of whether a sentence has been suspended, nothing in §§ 19.2–298 or 19.2–303 erases the conviction for purposes of parole ineligibility under Virginia's three strikes statute.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), that "elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper*, 476 U.S. at 5 n. 1, 106 S.Ct. 1669 (plurality opinion) (quoting *Gardner*, 430 U.S. at 362, 97 S.Ct. 1197), *quoted in part in Simmons*, 512 U.S. at 164, 114 S.Ct. 2187 (plurality opinion), and *quoted in id.* at 175, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). As both the plurality opinion and the O'Connor concurrence[4] recognized, the fact that the defendant will never be released from prison "will often be the only way that a violent criminal can successfully rebut the State's case [of future dangerousness]." *Simmons*, 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment); *id.* at 163–64, 114 S.Ct. 2187 (plurality opinion) ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant.... Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

This principle has full force in the case at bar. At capital sentencing, the prosecution presented evidence of Ramdass' future dangerousness. Some of this evidence included the fact that Ramdass had committed the Pizza Hut robbery and the Domino's Pizza robbery. More importantly, the Commonwealth repeatedly referred to the fact that Ramdass had committed many of his crimes while on parole. The Commonwealth mentioned the phrase "mandatory parole" several times, suggesting to the jury that the Commonwealth would have no choice but to parole Ramdass at some future date. In the face of this evidence of future dangerousness, Ramdass was rendered powerless to explain to the jury that, but for what was at that point a meaningless ministerial act, he was ineligible for parole under state law.[5] Thus, under *Gardner*, *Skipper*, and *Simmons*, Ramdass was denied his "elemental due process" right to deny or explain the Commonwealth's evidence of future dangerousness. *See Simmons*, 512 U.S. at 175 (O'Connor, J., concurring).

It is also important to remember the audience of the *Simmons* right. *Simmons* is concerned about the defendant's ability to present rebuttal evidence to a jury. Thus, *Simmons* is grounded in the right to present information which might affect a jury's decision making. Juries are not concerned about legal technicalities or remote and theoretical possibilities. They are concerned about practical realities. The Supreme Court recognized this point in *Simmons*. In *Simmons*, South Carolina argued that informing the jury that the defendant would be parole ineligible was inherently misleading because future contingencies such as legislative reform, commutation, and clemency might allow the release of the prisoner. The plurality rejected this argument, holding that the defendant could not be denied the right to rebut prosecution evidence of future dangerousness merely because of "hypothetical future developments." *Simmons*, 512

4. We have recognized Justice O'Connor's concurrence as the controlling opinion in *Simmons*. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, — U.S. —, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995).

5. The majority sets up a straw man by asserting that Ramdass has asked us to extend *Simmons* to situations in which a defendant is not ineligible for parole under state law. The majority relies in part on *Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999), *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), and *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.1998), to defeat this straw man. In each of those cases, however, the defendant remained eligible for parole under state law even when all ministerial acts were completed. Of course *Simmons* did not apply to each of those defendants. Those cases are wholly inapposite here, where Ramdass' whole argument is based on his parole ineligibility under state law.

U.S. at 166, 114 S.Ct. 2187. The court reasoned that a parole ineligibility instruction was more accurate than no instruction at all, which would inevitably leave the jury to assume that the defendant would eventually be released. *Id.* Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality that remote contingencies were irrelevant to the due process analysis.

In the case at bar, the majority hides its reliance on hypothetical future developments behind a state law shield. Because Ramdass did not become technically "parole ineligible" under Virginia law until judgment was formally entered on the Domino's Pizza robbery, the majority holds that *Simmons* is inapplicable. But at the time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. The reason the Supreme Court rejected reliance on such future hypothetical developments is evident in the arbitrary result of the case at bar. At the time of the Kayani sentencing, the court had already rejected Ramdass' motions in the Domino's Pizza robbery case to set aside the jury's verdict before entry of judgment. *See* Virginia Sup.Ct. R. 3A:15(a). Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible when the Kayani conviction was formally entered.

Further, there was at the time of the Kayani sentencing no practical basis for distinguishing between the Pizza Hut robbery guilty verdict and the Domino's Pizza robbery guilty verdict. Because the Rule 3A:15(a) motions had been denied for the Domino's Pizza robbery verdict, both verdicts were subject to an identical degree of uncertainty—either could be set aside only under a Rule 3A:15(b) motion or on appeal. Yet the majority asserts that the constitution requires us to treat the one as a certainty and the other as if it did not exist.

Splitting hairs when a man's life is at stake is not becoming to a judiciary or a legal system. I do not believe that due process requires or allows such arbitrary results. I would hold that, regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Radars had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole. I respectfully dissent.

PINE RIDGE COAL COMPANY, a corporation, Plaintiff–Appellee,

v.

LOCAL 8377, UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; Local 6426, United Mine Workers of America, an unincorporated labor association, Defendants–Appellants.

No. 97–2666.

United States Court of Appeals, Fourth Circuit.

Argued May 7, 1999.

Decided Aug. 4, 1999.

Mine operator brought action against union under Labor Management Relations Act (LMRA) seeking recovery of costs resulting from unauthorized work stoppage. Following entry of summary judgment in favor of operator on liability issues, the United States District Court for the South-

implicated here, and a few cases in which the employee was told by the employer that he or she would be fired after a specified time period. In this case, Plaintiff was not told that she would be fired,[5] and when she asked whether her supervisor wanted her to leave, he replied that he did not. Plaintiff wants to rely on her subjective belief that she would be fired if she remained on the job in support of her right to resign and still be entitled to all the legal remedies afforded those who are fired in violation of the federal employment anti-discrimination statutes. This position runs counter to the law of this circuit, see, *e.g., Bristow,* 770 F.2d at 1254–55; *Raley,* 752 F.Supp. at 1279, and is not in keeping with the limited purpose of the constructive discharge doctrine.

Because Plaintiff's constructive discharge claim must fail, Plaintiff is not entitled to back pay or any other damages resulting from her leaving her employment with Defendants.

III. *CONCLUSION*

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.

Bobby Lee RAMDASS, Petitioner,

v.

Ronald J. ANGELONE, Director of Virginia Department of Corrections, Respondent.

No. CIV. A. 2:96CV831.

United States District Court, E.D. Virginia, Norfolk Division.

Aug. 14, 1998.

Petitioner convicted of capital murder in state court sought habeas corpus relief, after exhausting state appellate and habeas procedures. The District Court, Jackson, J., held that: (1) some but not all claims that jury should have been informed that petitioner would receive life sentence without possibility of parole if death sentence was not imposed, were procedurally barred; (2) ineffective assistance of counsel claim based on failure to object to appointment of mental health expert did not preserve for habeas review claim of ineffective medical expert assistance; (3) state Supreme Court's determination that adequate proportionality review was performed was binding on federal court; (4) state Supreme Court's summary disposition of habeas petition was adjudication on merits entitled to deference in federal habeas corpus review; (5) state Supreme Court made unreasonable determination of facts and unreasonably applied a United States Supreme Court precedent in determining that the Supreme Court's *Simmons* decision, requiring that jury considering future dangerousness factor in assessing whether to impose death penalty be informed that capital murder defendant would receive life imprisonment without parole if not put to death, was inapplicable because parole was possible in present case; (6) petitioner did not receive ineffective assistance of counsel; (7) rule requiring ex parte hearings on defendant's requests for appointment of experts would not be applied for first time on collateral review; (8) exclusion of polygraph evidence did not violate petitioner's constitutional rights; (9) withholding of exculpatory materials did not constitute constitutional violation affecting conviction; (10) trial court's determination of state law matters would not be reviewed; (11) court would not rule that unadjudicated crimes evidence was inadmissible in capital murder case, as new rule would be created in collateral proceeding; and (12) capital murder sentencing statute was not unconstitutionally vague.

Petition granted in part, denied in part.

5. As for Plaintiff's allegation that she was repeatedly threatened with termination, the record reveals only two instances, one oral and one in writing, in which "termination" was mentioned to Plaintiff (a 11/10/95 meeting with Mr. Deutsch, and a 12/04/95 memorandum from Mr. Deutsch to Plaintiff). On both occasions, it was stated that failure to correct the dramatic drop in Plaintiff's sales performance (specifically, failure to generate new business and failure to generate a single sale out of over forty "qualified prospects") may result in Plaintiff being terminated.

1. Habeas Corpus ⇐319.1

A claim is "exhausted," for federal habeas corpus review purposes, if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. 28 U.S.C.A. § 2254(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⇐422

Federal district court may not review claims that have been clearly and expressly defaulted under an independent and adequate state procedural rule. 28 U.S.C.A. § 2254(b).

3. Criminal Law ⇐1030(1)

Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va.Sup.Ct.Rules, Rule 5:25.

4. Habeas Corpus ⇐287.1

With the exception of ineffective assistance of counsel claims, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings, under Virginia law.

5. Habeas Corpus ⇐898(1)

Under Virginia law, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code 1950, § 8.01–654, subd. B, par. 2.

6. Habeas Corpus ⇐898(1)

Under Virginia law, no writ of habeas corpus is to be granted on basis of any allegation facts of which petitioner had knowledge at time of filing of any previous habeas petition. Va.Code 1950, § 8.01–654, subd. B, par. 2.

7. Habeas Corpus ⇐382

Both operative facts and legal principles must be presented to state court before claim may be subject of federal habeas corpus review. 28 U.S.C.A. § 2254.

8. Habeas Corpus ⇐404

When a petitioner can show both cause for and prejudice resulting from default of a claim on state procedural grounds, a federal court may extend habeas corpus review to a defaulted claim. 28 U.S.C.A. § 2254.

9. Habeas Corpus ⇐405.1

To establish "cause" sufficient to allow federal habeas corpus review of procedurally defaulted state claim, a petitioner must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

10. Habeas Corpus ⇐409

To establish "prejudice" sufficient to allow federal habeas corpus review of procedurally defaulted state claim, a petitioner must show that the error worked to his actual and substantial disadvantage, not merely that it created a possibility of prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

11. Habeas Corpus ⇐401

If a habeas corpus petitioner cannot show "cause" and "prejudice" sufficient to excuse a state procedural default of his or her claims, the claims may still be reviewed when refusal to do so would result in a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

12. Habeas Corpus ⇐401

To establish "miscarriage of justice" sufficient to allow federal habeas corpus review of procedurally barred state claim, a petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, or when death sentence is being challenged, petitioner must show by clear and convincing evidence that but for a constitutional error no reasonable juror would find petitioner eligible for the death penalty. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

13. Habeas Corpus ⇐369

Habeas petitioner's challenge to state supreme court's determination, that he was parole eligible rendering inapplicable United States Supreme Court's ruling that noneligibility for parole must be disclosed to jury when future dangerousness was issue in capital murder sentencing proceeding, was procedurally barred, due to failure of petitioner to request reconsideration of state supreme court's decision. U.S.C.A. Const.Amends. 8, 14; 28 U.S.C.A. § 2254.

14. Habeas Corpus ⇐339

State court claim that defendant charged with capital murder received ineffective assistance of counsel, when his attorney did not object to appointment of medical expert who allegedly would not work with defendant and put on medical health testimony, did not preserve for habeas review claim that court-appointed medical health expert was ineffective. U.S.C.A. Const.Amends. 5, 8, 14; 28 U.S.C.A. § 2254.

15. Habeas Corpus ⇐364

Failure of defendant, convicted of capital murder, to raise in state habeas proceedings claim that his counsel was ineffective for attempting to prove inconsistent defenses, precluded federal habeas corpus review of claim. U.S.C.A. Const.Amends. 5, 6, 8, 14; 28 U.S.C.A. § 2254.

16. Habeas Corpus ⇐423

State was precluded from defending habeas corpus claim of lack of expert assistance by asserting defense of procedural default; state had failed to assert defense in earlier state court appeals proceedings, choosing to address claims on merits. 28 U.S.C.A. § 2254.

17. United States Magistrates ⇐25

Trial court would deem habeas corpus point discussed by magistrate judge in report and recommendation, without objection by either side, to have not been procedurally defaulted. 28 U.S.C.A. § 2254.

18. Habeas Corpus ⇐770

State supreme court's determination, that it performed adequate proportionality review before approving death sentence, bound federal court conducting habeas review. 28 U.S.C.A. § 2254.

19. Habeas Corpus ⇐765.1

A state court decision that summarily dismisses a habeas corpus petitioner's claim as meritless is an adjudication on the merits entitled to deference on federal habeas corpus review, under the Antiterrorism and Effective Death Penalty Act. 28 U.S.C.A. § 2254(d).

20. Habeas Corpus ⇐503.1

State supreme court made "unreasonable determination of the facts," allowing for habeas corpus review of its conclusion that petitioner convicted of capital murder would not be subject to compulsory life sentence if death sentence was not imposed; state supreme court applied inconsistent reasoning in concluding that present offense could be counted toward determining if defendant had committed three violent felonies, as required for lifetime commitment without parole under state statute, even though sentencing in present case was not yet complete, while denying applicability of third violent felony for which he was convicted on grounds that sentencing had not occurred. 28 U.S.C.A. § 2254(b); Va.Code 1950, § 53.1–151, subd. B1.

21. Habeas Corpus ⇐498

State supreme court unreasonably applied United States Supreme Court precedent, in upholding death penalty, by claiming that Supreme Court's *Simmons* decision, requiring disclosure to jury asked to evaluate future dangerousness of fact that defendant would be sentenced to life imprisonment without possibility of parole if not sentenced to death, on grounds that mandatory life sentence was not required in present case; state supreme court read state statute precluding parole in illogical manner. 28 U.S.C.A. § 2254(b).

22. Criminal Law ⇐641.13(6)

It is not ineffective assistance of counsel to advise one's client not to testify. U.S.C.A. Const.Amends. 5, 6, 8, 14.

23. Criminal Law ⇐641.13(6)

Defendant charged with capital murder did not receive ineffective assistance when his attorney failed to challenge testimony regarding ballistic matters given by state witness qualified only as firearms identification expert. U.S.C.A. Const.Amends. 5, 6, 8, 14.

24. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance of counsel who did not object when co-defendant testified that he received life sentence; there was no evidence that defendant would have received less harsh sentence had testimony in question been excluded. U.S.C.A. Const. Amends. 5, 6, 8, 14.

25. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance of counsel who informed jury that defendant was bad person who might commit crimes in future, even though defendant claimed that attorney conceded major issue of future dangerousness for sentencing purposes; statement was designed to establish credibility with jury, and was followed by argument that defendant would not pose future danger as he would be locked up for rest of life if not sentenced to death. U.S.C.A. Const.Amends. 5, 6, 8, 14.

26. Criminal Law ⇐641.13(7)

Defendant charged with capital murder did not receive ineffective assistance on grounds that counsel did not adequately prepare for sentencing phase; counsel presented evidence of dysfunctional childhood through testimony of defendant, mother, brother and probation officer. U.S.C.A. Const.Amends. 5, 6, 8, 14.

27. Criminal Law ⇐641.13(6)

Defendant charged with capital murder did not receive ineffective assistance of counsel when his attorney allegedly did not research background of court-appointed mental health expert and discover expert's alleged pro-prosecution bias; there was no prejudice, as defendant never claimed that he was operating under mental defect when he committed offense. U.S.C.A. Const.Amends. 5, 6, 8, 14.

28. Courts ⇐100(1)

Rule established by federal courts requiring ex parte hearings on defendants' requests for appointment of experts would not be applied for first time to state court proceedings at federal habeas corpus review stage. U.S.C.A. Const.Amends. 5, 6, 8, 14; 18 U.S.C.A. § 3006A(e)(1); 28 U.S.C.A. § 2254.

29. Criminal Law ⇐388.5(1)
Homicide ⇐174(1)

Refusal of trial court to admit exculpatory results of polygraph test, pursuant to state evidentiary rule, does not constitute denial of capital murder defendant's right to present exculpatory evidence. U.S.C.A. Const.Amends. 5, 6, 14.

30. Criminal Law ⇐700(3)

Federal constitutional rights of defendant charged with capital murder were not violated when prosecutor withheld allegedly exculpatory statements made to police by co-defendants and other prospective witnesses; there was no showing that outcome of trial would have been different if withheld material had been disclosed. U.S.C.A. Const. Amends. 5, 6, 14.

31. Habeas Corpus ⇐453

Federal district court exercising habeas review of capital murder case would not disturb determination of state trial court, affirmed by state Supreme Court, declining to admit evidence tending to show witness' character and propensity for criminal conduct; only state criminal procedure and evidence points were involved. U.S.C.A. Const. Amends. 5, 6, 14; 28 U.S.C.A. § 2254.

32. Habeas Corpus ⇐490(6)

Federal district court exercising habeas corpus review of state capital murder case would not rule that admission of unadjudicated criminal conduct was impermissible in penalty phase; affirmative response would create new rule, generally not created by federal district courts on collateral review. U.S.C.A. Const.Amends. 5, 6, 14; 28 U.S.C.A. § 2254.

33. Homicide ⇐351, 357(6)

Virginia capital murder sentencing statute was not unconstitutionally vague, despite use of term "future dangerousness." U.S.C.A. Const.Amend. 14; Va.Code 1950, § 18.2–18.

Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Capital Habeas Litigation Section, Richmond, VA, for Ronald J. Angelone.

John M. Ryan and Nash F. Bilisoly, Vandeventer, Black, Meredith and Martin, LLP, Norfolk, VA, Michele J. Brace, Robert Edward Lee, Jr., Mark E. Olive, Virginia Capital Representation Resource Center, Richmond, VA, for Bobby Lee Ramdass.

OPINION AND FINAL ORDER

JACKSON, District Judge.

In January, 1993, Petitioner was convicted in the Circuit Court of Fairfax County, Virginia for the September, 1992 murder of Mohammad Z. Kayani, a convenience store clerk. Pursuant to the jury's recommendation, on April 2, 1993, the court sentenced Petitioner to death. Subsequently, Petitioner exercised his state appeals to no avail. On March 11, 1997, Petitioner filed an amended petition for a federal writ of habeas corpus, pursuant to 28 U.S.C. § 2254,[1] alleging violations of federal constitutional rights during his conviction and sentencing. This matter comes before the Court on Respondent's April 28, 1997 motion to dismiss the petition. On June 3, 1997, Petitioner filed a response to Respondent's motion to dismiss. On June 26, 1997, Respondent filed a reply to Petitioner's response.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia, the matter was referred to a United States Magistrate Judge for Report and Recommendation ("R & R"). On February 27, 1998, the Magistrate Judge filed his R & R. He found merit in one ground in the petition and recommended that the motion to dismiss be denied and that Petitioner's case be remanded for resentencing.

By copy of the R & R, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On March 30, 1998, this Court received "Petitioner's Objections to Magistrate Judge's Report and Recommendation" and "Respondent's Objections to the Magistrate Judge's Report and Recommendation." On April 13, 1998, both parties filed respective replies to the objections.

With some exceptions, Petitioner objects to the Magistrate Judge's recommendations to deny certain claims on the basis of procedural default. Of the claims the Magistrate Judge addressed on the merits, Petitioner does not contest the ultimate recommendation to order Petitioner's resentencing; however, he does object to the recommendations to deny the remaining claims on the merits. Further, Petitioner maintains that he is entitled to conduct discovery and present evidence on his claims which were denied on the merits. Respondent disagrees with the standard the Magistrate Judge utilized in concluding that certain claims were not procedurally defaulted and the recommendations that certain claims were not procedurally defaulted. Additionally, Respondent objects to the ultimate recommendation to remand Petitioner's case for resentencing. Both parties object to the standard of review the Magistrate Judge applied when evaluating claims on the merits.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Court, having reviewed the record in its entirety, shall make a *de novo* determination of those portions of the Magistrate Judge's R & R to which the parties specifically objected. The Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I. FACTS AND PROCEDURAL HISTORY

The R & R contains a detailed statement of the facts surrounding the crime, Petition-

1. On February 14, 1997, Petitioner filed his initial petition.

er's conviction and sentencing, and subsequent state appeals. (R & R 2–17.) The Court adopts the Magistrate Judge's explication of facts, with some modifications. The facts and procedural history are as follows.

A. Facts

During the night of September 1, 1992, and early morning of September 2, 1992, Petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh,[2] Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including Petitioner, decided that they would rob persons at a 7–Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7–Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and to not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes, Kool Aid and lottery tickets from the store's stock.

After Petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f— head off.[3]" *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 568 (Va.1993). At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206–07.) Immediately thereafter, Singh, standing behind Petitioner, saw Petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211–12.) Testifying about the precise moment of the shooting, Singh stated that Petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after Petitioner shot Kayani, Ramirez testified that he returned from a back room in the store. Ramirez saw Petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.)[4] Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Petitioner to "[c]ome on." (*Id.* at 146.) However, Petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the clicking of the gun as Petitioner left. (1/27/93 Tr. at 125, 129–30.)

When they got in the car, Ramirez heard Petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, Petitioner told Ramirez, "[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146–47.)

Singh, a co-owner of the gun with Petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. (*Id.* at 213.) Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 245, 248.) Mason testified that the 9 millimeter cartridges Petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Consequently, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250–51.) Mason further testified that when the muzzle was pointed up, the cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

2. For this crime, Singh had plead guilty to murder as a principal in the second degree, robbery, and use of a firearm in the commission of a robbery as a principal in the second degree. He testified that he faced three life sentences plus six years. (1/27/93 Tr. 202.) In exchange for his testimony, charges for other robberies in which he had participated were dropped.

3. Another employee of the 7–Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

4. Later, Ramirez heard Petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.)

On direct, after stipulating as to her expertise, the medical examiner testified that the bullet which killed Mr. Kayani entered the left side of his head, just above the left ear, traveled forward, upward and rightward exiting out the right side of his head. (*Id.* at 99–100.) On cross examination, the medical examiner was questioned in more detail about the track of the bullet through the head and revealed that powder burns and debris were found on Kayani's head. (*Id.* at 102.)

Based on the evidence, the jury convicted Petitioner of capital murder and the use of a firearm in the commission of a felony. The case proceeded to the capital sentencing phase. The Commonwealth, in seeking the death penalty, relied solely upon the "continuing serious threat to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of Petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by Petitioner and threatened with a gun during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by Petitioner. At the time of trial, Petitioner had been convicted of the Pizza Hut and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7–Eleven crimes, Petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

In opening statements, which had been reserved, defense counsel argued that Petitioner need not be sentenced to death on the basis of future dangerousness because he was already required to serve at least 99 years in jail. The length of the term precluded release and eliminated any future threat to society. Toward the end of the opening, trial counsel stated: "Bobbie Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future." (1/29/93 Tr. 98.)

Trial counsel informed the jury of Petitioner's extensive juvenile record. Beginning in 1985, Petitioner came before the Court for a purse snatching, for which he received probation, (1/29/93 Tr. at 198–99); theft of a moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he received an adult sentence to Southampton prison, (1/29/93 Tr. at 17–18, 202). The jury also learned that Petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149–51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85–86, 202).

Furthermore, the defense presented evidence of a bleak, abusive, unstructured childhood. Petitioner was physically and emotionally abused and raised in conditions of severe deprivation. There was no positive guidance.

Petitioner's brother, Mark Ramdass, testified on Petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and to try to keep him out of trouble. (1/29/93 Tr. 103–05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, Petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when Petitioner was born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges. She also confirmed that she twice lost custody of her children for neglect. (1/29/93 Tr. 227–28.)

She described how Petitioner was physically abused by a boyfriend and how she tanght petitioner to defend himself. She admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She had prepared the probation report following Petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of Petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on Petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of Petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner did not call the court-appointed health expert to testify as to Petitioner's mental health or mitigating circumstances. After an evaluation, the court-appointed expert concluded that there were no mitigating circumstances in Petitioner's case.

Finally, though Petitioner did not testify in the guilt phase, Petitioner did testify in the sentencing phase. (1/29/93 Tr. 132–216.)

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding, they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278). The court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.) The Court did not directly answer the jury's question.

Ultimately, on January 30, 1993, the jury unanimously recommended a sentence of death for Petitioner. On April 2, 1993, the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder.

B. Procedural History

On September 2, 1992, Petitioner murdered Muhammad Kayani, a clerk employed at a 7–Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7–Eleven robbery and murder. On September 21, 1992, Petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued. On November 2, 1992, the trial court denied Petitioner's request to make an ex parte showing of need for expert assistance. (11/2/92 Tr. 20–32.) On December 8, 1992, the trial court denied Petitioner's motion for a physical exam concluding that there was a lack of information sufficient to establish the need for an exam. (12/8/92 Tr. at 6.) Counsel then proffered that he needed the exam to determine whether Petitioner suffered from a reflexive disorder. (*Id.* at 7–8.) Next, the trial court denied Petitioner's request for appointment of an expert investigator, but did appoint a third attorney to the defense team. (*Id.* at 22.) Next, the trial court declined to order the Commonwealth to turn over to Petitioner statements Petitioner claimed were exculpatory. (*Id.* at 44.)

The matter came on for trial on January 26, 1993. The first day consisted of jury *voir dire* and selection. At trial, Petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictment, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidentiary portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony. Petitioner was sentenced to four years in the penitentiary for the latter crime. Following the jury verdict, the court found Petitioner guilty with respect to Count II, robbery, finding on the record that Petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, *sua sponte*, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of the preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. Sentencing was continued from that date, however, until April 2, 1993, at which time the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict for use of a firearm in the commission of a felony; and life for the robbery, incident to Petitioner's plea of guilty.

Trial counsel pursued a direct appeal on behalf of Petitioner, assigning the following errors:

1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
3. The Trial Court erred in granting an extended reasonable doubt instruction.
4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*, tried in the same circuit and approved by the Virginia Supreme Court.
5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.
6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.
7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B–S" which instructed the jury that they must all agree that the Defendant would be a future danger.
8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E–S" which instructed they jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.
9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation of § 19.2–264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.
10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.
11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.
12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.
13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, and private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to *voir dire* the jury regarding specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for *in-camera* requests for expert witnesses in violation of his Fourth. Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7–11; as to the specific location of Mr. Ramirez on dates preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (Va.1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and ruled that

where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

As presented by Petitioner to the Supreme Court of Virginia on remand, the sole issue in *Simmons* was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that *Simmons* was not raised in the trial court; that Petitioner was eligible for parole and *Simmons*, therefore, did not apply; and that *Simmons* was irrelevant because the sentencer can always consider parole ineligibility. On November 4, 1994, the Supreme Court rejected Petitioner's claim, found that Petitioner was eligible for parole, and concluded that *Simmons* did not apply. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (Va.1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085, 115 S.Ct. 1800, — L.Ed.2d — (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth. On August 30, 1995, Petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper *voir dire*, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a *Simmons* error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

On January 19, 1996, the court denied an *ex parte* motion for expert assistance and an investigator. On March 18, 1996, the court denied the habeas petition without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that Petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to Petitioner, and that the trial court denied Petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the *Simmons* claim was well articulated. The petition for rehearing was denied June 7, 1996.

The Circuit Court of Fairfax County set Petitioner's execution for August 28, 1996. On June 25, 1996, Petitioner filed a motion to

stay execution, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, Petitioner moved for a stay of execution and for leave to proceed *in forma pauperis*, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

II. CLAIMS PRESENTED

Petitioner sets forth the following claims as grounds for federal habeas relief.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The *Simmons* claim).

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was either nonexistent or internally inconsistent.
   a. Petitioner was unreasonably advised not to testify.
   b. Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent.
   c. Trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner.
   d. Trial counsel failed to cross examine the prosecution's "firearms identification" expert.
   e. Trial counsel failed to obtain expert assistance.
2. Trial counsel failed to object to co-defendant's testimony about his life sentence.
3. Trial counsel failed to establish Petitioner's parole ineligibility.
   a. Trial counsel failed to request schedule adjustments which would have created Petitioner's parole ineligibility.
   b. Trial counsel failed to challenge the determination that Petitioner was eligible for parole.
4. Trial counsel failed to conduct adequate *voir dire*.
5. Trial counsel conceded the sole aggravating factor in the penalty phase.
6. Trial counsel failed to adequately prepare for the penalty phase.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

F. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

G. The Virginia death penalty statute on its face, and as applied, violates the Sixth, Eighth and Fourteenth amendments.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

K. Virginia's capital murder sentencing statute is unconstitutional.

III. PROCEDURAL DEFAULT

[1] Title 28 U.S.C. § 2254(b) requires exhaustion of claims before presentment to federal courts. A claim is exhausted if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Respondent objects to the standard the Magistrate Judge employed for determining when a claim has been procedurally defaulted. In addition, in most cases, each party objected to the Magistrate Judge's underlying recommendation as to whether a particular claim was procedurally defaulted. Accordingly, the Court will first outline the rules of procedural default and its exceptions. The Court will then determine whether each individual claim is preserved or defaulted.

Standard for Procedural Default

[2–5] This Court may not review claims that have been clearly and expressly defaulted under an independent and adequate Virginia state procedural rule. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va. S.Ct. R. 5:25; *Coppola v. Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S.E.2d 10 (Va.1981). Further, excepting ineffective assistance of counsel claims which may first be presented on collateral review, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings. *Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698, 699 (Va. 1983); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (Va.1974). Finally, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code § 8.01–654(B)(2).

In his motion to dismiss, Respondent argued that certain arguments supporting some of Petitioner's claims were never presented to the state courts and, therefore, the arguments were procedurally defaulted pursuant to Va.Code § 8.01–654(B)(2). The Magistrate Judge concluded: "A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings." (R & R 26.) Additionally, in several instances, the Magistrate Judge stated that where a claim was raised in the state proceedings, though the argument was not necessarily in the exact same nature, tenor or form, the matter was not procedurally defaulted. (*See, e.g.*, R & R 33, 36, 37.) Citing *Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998) and *Mallory v. Smith*, 27 F.3d 991 (4th Cir.1994), Respondent objects and reiterates his contention that the argument presented to the federal court must be precisely the same argument presented to the state courts. Respondent claims that the Magistrate Judge considered arguments which were never presented to the state courts, but "now are presented under the heading of a claim that arguably was presented in state court."

[6, 7] Virginia Code § 8.01-654(B)(2) establishes a bright-line rule providing that a habeas petition "shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.". The Fourth Circuit has held that both the operative facts and legal principles, *i.e.* the argument, must be presented to the state courts or else the claim is barred from federal review. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Accordingly, Respondent's objection to the standard the Magistrate Judge used to for determinations of procedural default is **SUSTAINED.**

Excuse of Procedural Default

[8–12] Despite the rule barring federal review of claims which have been defaulted on adequate and independent state grounds, two exceptions exist which excuse procedural default and permit federal review. First, where a petitioner can show both cause for and prejudice resulting from his default, a federal court may review a defaulted claim. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. With respect to "cause," a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct.

2639, 91 L.Ed.2d 397 (1986). With respect to "prejudice," a petitioner must show that the error worked to his "*actual* and substantial disadvantage," not merely that it created a "*possibility* of prejudice." *Id.* at 494, 106 S.Ct. 2639 (emphasis in original), *quoting United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Second, if a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal to do so would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. To meet the miscarriage of justice exception, the petitioner must show either that a constitutional violation has probably resulted in the conviction of one who is actually innocent, *Schlup*, 115 S.Ct. at 867, or, for those petitioners who are sentenced to death, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would find him eligible for the death penalty ...."[5] *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the eighth and fourteenth amendments (The *Simmons* claim).

[13] The Magistrate Judge found that this claim was not procedurally defaulted because, regardless of the precise nature or form of the argument, the issue of whether the sentencing jury was entitled to know Petitioner's parole eligibility status was presented both on direct appeal and in the state habeas proceeding. (R & R 33–34.) Respondent objects contending that the Magistrate Judge considered legal arguments which were never presented to the state courts and, therefore, may not now be considered by this Court.

At no point has Respondent directed the Court's attention to any new arguments which should have been raised in state court. In his response to the motion to dismiss, Petitioner identified two purportedly new arguments: (1) on remand from the United States Supreme Court, the Virginia Supreme Court exceeded its constitutional authority and determined Petitioner's parole eligibility status and (2) on remand from the United States Supreme Court, the Virginia Supreme Court's decision that Petitioner was parole eligible was arbitrary. Petitioner argued that neither claim was procedurally defaulted because Petitioner could not challenge an error which did not arise until the Virginia Supreme Court handed down its opinion on the *Simmons* issue, and, once the decision was rendered, Petitioner was not required to submit a discretionary petition for rehearing in order to exhaust his remedies. In his reply to the Petitioner's response, Respondent summarily dismissed Petitioner's arguments as "silly," claiming that nothing prevented Petitioner from raising these arguments to the Virginia Supreme Court and, therefore, they are now barred from federal review.

The Court finds that the arguments have been procedurally defaulted. After the Virginia Supreme Court issued its decision declaring that Petitioner was parole eligible, Petitioner did not request reconsideration of the decision, rather, Petitioner presented these allegedly new arguments to the United States Supreme Court on an unsuccessful second request for review. Pursuant to *Slayton*, 215 Va. 27, 205 S.E.2d 680, Petitioner could have presented the arguments to the Virginia Supreme Court in his initial habeas petition because the issues could not have been raised at trial or on direct appeal. Petitioner, however, did not present the arguments; thus, the argument would now be procedurally defaulted pursuant to Va.Code § 8.01–654(B)(2). Accordingly, the arguments may not be considered by this Court, and Respondent's objection is **SUSTAINED.** These new arguments will not be addressed on the merits, but the preserved *Simmons* issues will be discussed.

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

Petitioner claims that he was denied the constitutional right, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to the assistance of a mental health expert. The Magistrate Judge determined that the claim was procedurally defaulted because it was neither presented on direct appeal nor in the state habeas petition. (R & R 34–35.) Petitioner objects arguing that the language in the state habeas petition was a dual claim which clearly argued a violation of *Ake* in addition to ineffective assistance of counsel for failure to secure a mental health expert.

[14] The Court finds that the *Ake* claim has been procedurally defaulted because it was not presented to the state courts. In his state petition, habeas counsel claimed that trial counsel was ineffective for failing to object to a court-appointed mental health expert who would not work with Petitioner and to put on expert mental health testimony. Petitioner did not, however, explicitly argue that the court-appointed mental health expert was ineffective. Accordingly, Petitioner's objection is **OVERRULED.** The *Ake* ineffective mental health expert claim will not be addressed on the merits.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

[15] Petitioner's claim here is two-fold. First, Petitioner claims that trial counsel's strategy was ineffective because the choice of defenses was inconsistent.[6] Second, Petitioner claims that trial counsel's strategy was ineffective because they failed in four instances to produce any evidence on Petitioner's intent. The Magistrate Judge determined that any claim of ineffective assistance of counsel based on inadequate trial strategy was not presented to the state courts and, accordingly, was procedurally defaulted. (R & R 35.) Of the four instances in which Petitioner claims intent evidence should have been produced, the Magistrate Judge evaluated them individually and determined that two were procedurally defaulted: (1) that Petitioner was unreasonably advised not to testify and (2) that, as to the location of the bullet, trial counsel was ineffective in failing to obtain experts to assist in the defense of the case.[7] (R & R 35–36.) Petitioner objects arguing that the trial strategy claim is a "convenient umbrella" for the underlying sub-claims which were all presented to the state courts. Petitioner concludes, therefore, that both the trial strategy claim and the underlying sub-claims regarding intent evidence are preserved. With respect to any remaining ineffectiveness claims for failing to obtain expert assistance, which the Magistrate Judge found were not procedurally defaulted, Respondent objects.

The Court finds that the argument that the defenses were inconsistent is procedurally defaulted. In the state habeas petition, trial counsel was not charged with being ineffective for attempting to prove seemingly

5. In his motion to dismiss, Respondent argued that the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent pointed to 28 U.S.C. § 2264(a). Respondent did not pursue this argument in his objections and, for two (2) reasons, the Court offers no opinion on this argument. First, it is not clear to this Court whether Congress's intention in writing § 2264(a) was to completely eliminate the "actual innocence" exception in capital cases or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. Second, because this Court has previously found that Virginia is not an "opt-in" state, (Mem. Op. and Order, Dec. 6, 1996.), § 2264(a) does not apply.

6. That is, it was ineffective for trial counsel to argue: "The bullet did not come from Defendant's gun but if you find that it did, then Defendant did not intentionally shoot the victim but did so accidentally."

7. The Magistrate Judge reviewed on the merits the sub-claims that (1) trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent, (2) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner, (3) trial counsel failed to cross examine the prosecution's firearms identification expert and (4) trial counsel failed to obtain expert assistance. (R & R 45–53.)

inconsistent defenses. Accordingly, Petitioner's objection is **OVERRULED.**

[16] With respect to the claim of ineffectiveness for failure to present intent evidence, the Court finds that neither the claim itself nor the underlying sub-claims, excepting one, have been procedurally defaulted. Petitioner explicitly claimed in the state habeas petition that trial counsel was ineffective for not producing intent evidence. As to the claim of unreasonable advice not to testify, Petitioner clearly raised the issue in the state habeas petition and, additionally, in his motion to dismiss, Respondent addressed the claim on its merits. Finally, in reviewing Respondent's motion to dismiss, the Court finds that the only portion of the argument regarding expert assistance which Respondent claimed was procedurally defaulted was that pertaining to the location of the bullet. Respondent did not argue that the remaining arguments regarding lack of expert assistance were procedurally defaulted, but instead addressed them on the merits. Consequently, the defense of procedural default was waived, *Trest v. Cain*, 522 U.S. 87, ——, 118 S.Ct. 478, 480, 139 L.Ed.2d 444 (1997), and cannot now be raised on objection to the R & R. Accordingly, Petitioner's objection is **SUSTAINED** and Respondent's objection is **OVERRULED.**

2. Trial counsel failed to object to a co-defendant's testimony about his life sentence.

[17] In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 53.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

The Magistrate Judge determined that trial counsel's failure to establish parole ineligibility by failing to request rescheduling of the trial was procedurally defaulted, but that failure to challenge the determination that Petitioner was not ineligible for parole was not procedurally defaulted because it was related to the *Simmons* claim. (R & R 36.) Respondent objects to the Magistrate Judge's latter determination. Petitioner concedes that neither claim was raised in the state proceedings and further, in light of the fact that the Fourth Circuit vacated *Mackall v. Murray*, 109 F.3d 957 (4th Cir.1997) in *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (en banc), does not object to the Magistrate Judge's determinations. Accordingly, Respondent's objection is **SUSTAINED.** Neither argument will be addressed on its merits.

4. Trial counsel failed to conduct adequate voir dire.

On page 37 of the R & R, the Magistrate Judge stated that all the arguments regarding the effectiveness of trial counsel's jury *voir dire* were preserved. Respondent objects to this statement arguing that the Magistrate Judge should have found all claims to be procedurally defaulted, excepting those related to jurors Amelia, Powell, Ross and the questioning of the entire panel regarding mitigating factors. On page 56 of the R & R, the Magistrate Judge stated that because the claims related to jurors Amelia, Powell, Ross and the questioning of the entire pool regarding mitigating factors had been raised during the state proceedings, only those claims would be considered. With the exception of these, the Magistrate Judge declined to address any other jury *voir dire* issues. Accordingly, Respondent's objection is **OVERRULED.** Review of the merits of this claim will be limited to the issues surrounding jurors Amelia, Powell and Ross and the questioning of the entire pool regarding mitigating factors.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 58.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

6. Trial counsel failed to adequately prepare for the penalty phase.

This claim encompasses two (2) arguments: trial counsel was ineffective for failing to object to the court-appointed mental health expert and trial counsel was ineffective for failing to present expert mitigating evidence. The Magistrate Judge determined that the former argument was procedurally defaulted, but the latter preserved. (R & R 59.) Petitioner objects raising two arguments. First, Petitioner urges that the Magistrate Judge's conclusion is inconsistent with the previous determination that the ineffectiveness claim was preserved. (R & R 34.) Second, Petitioner claims that Respondent waived procedural default.

The Court finds that the claim is not procedurally defaulted. The ineffective assistance of counsel claim was clearly raised in the state habeas proceeding where Petitioner claimed that trial counsel failed to object to the court-appointment mental health expert who would not work with the defense and failed to put on any expert mitigating testimony. Accordingly, Petitioner's objection is **SUSTAINED.** Both arguments will be addressed on the merits.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 62.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 68.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

F. The refusal to allow Petitioner exculpatory statements, the refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's conclusion that, with the exception of the assertion of the right to an *in camera* hearing, this claim was procedurally defaulted. (R & R 31–33.) Accordingly, the Court adopts the findings made by the Magistrate Judge. The preserved claim will be reviewed on the merits.

G. The Virginia death penalty statute on its face and as applied violates the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim had not been procedurally defaulted. (R & R 37.) Respondent objects arguing that some of the arguments that the Magistrate Judge considered were new arguments which were never presented to the state courts. Turning to Respondent's memorandum in support of his motion to dismiss, the Court finds that Respondent argued that five (5) specific arguments for unconstitutionality were procedurally barred because they were not raised in the state proceedings. They are: (i) that jurors are not informed that a life sentence will be imposed unless the jury recommends death; (ii) that the "vileness" aggravating factor is vague; (iii) that death by legal injection is cruel and unusual; (iv) that the sentencing statute does not require that a death sentence be set

aside if a court finds "good cause;" and (v) that the sentencing statute allows for hearsay in the post-sentence report.

On direct appeal, Petitioner argued (1) that death by electrocution is cruel and unusual and (2) that the Virginia death penalty statute is unconstitutional because "future dangerousness" is not meaningfully defined and no jury instruction is required in consideration of mitigating evidence. In his state habeas petition, Petitioner did not challenge the constitutionality of the death penalty statute. Accordingly, Respondent's objection is **SUSTAINED.** Those particular arguments will not be considered by this Court, but any remaining arguments will be evaluated on their merits.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 85.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that this claim was not procedurally defaulted because it had been raised both on direct appeal and in the state habeas proceedings. (R & R 37.) Respondent objects arguing that the claim that trial counsel was inadequate for failing to object to the admission of unadjudicated conduct without a burden of proof instruction is a new claim which was not presented to the state courts.

The Court finds that the claim is not procedurally defaulted because it was clearly raised before the state courts. On direct appeal, Petitioner claimed that the trial court erred in failing to proffer to the jury an instruction which stated a burden of proof for consideration of unadjudicated misconduct. In the state habeas proceeding, Petitioner claimed that trial counsel was ineffective for failing to object to the admission of evidence of prior unadjudicated misconduct. Further, habeas counsel alleged that the trial court erred in permitting evidence of unadjudicated prior misconduct even without an objection to such evidence. Accordingly, Respondent's objection is **OVERRULED.**

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

[18] The Magistrate Judge determined that the issue of the sufficiency of the Virginia Supreme Court's proportionality review was procedurally defaulted, but that the issue of whether Petitioner's sentence was imposed under the influence of passion, prejudice or any other arbitrary factor or disproportionate was not procedurally defaulted. (R & R 33, 73.) Petitioner objects to the former conclusion. Respondent objects to the latter.

Va.Code § 17–110.1(C) mandates review of death sentences for proportionality and for passion, prejudice or arbitrariness, in addition to consideration of any errors alleged by a defendant. On direct appeal, Petitioner did not argue that either of these situations applied in his case. On direct review, the Virginia Supreme Court determined that Petitioner's death sentence was neither disproportionate nor influenced by passion, prejudice or arbitrariness. In his initial state habeas petition, Petitioner did not argue that the court had inadequately performed its review for passion, prejudice or arbitrariness, but did argue that the Virginia Supreme Court failed to adequately perform its proportionality review of his death sentence. The Virginia Supreme Court found the latter argument to be procedurally defaulted pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, but the court did not explain how and why *Slayton* applied to this claim. Given that the issue of whether the court adequately performed its review for proportionality could not be raised until such a review

was conducted, logic dictates that the claim could not be raised until the state habeas petition was filed. Thus, the reasoning of the Virginia Supreme Court is perplexing. Nevertheless, this Court cannot review the quality of the decision.[8] It is axiomatic that federal courts do not review state decisions based solely upon adequate and independent state law. Accordingly, Petitioner's objection is **OVERRULED.** Because Petitioner did not argue in his federal petition that the death sentence was imposed under passion, prejudice or arbitrariness or that the sentence was disproportionate, the Court finds that the claim is not properly before the Court. Accordingly, Respondent's objection is **SUSTAINED.** Neither argument will be considered on its merits.

K. Virginia's capital murder sentencing statute is unconstitutional.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 77.), thereby implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

IV. CLAIMS REVIEWED ON THE MERITS

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") is generally applicable to Petitioner's case, because his petition was filed well after April 24, 1996, the enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[9] The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Both parties object to the standard of review as outlined by the Magistrate Judge. Petitioner objects arguing that in evaluating the Virginia Supreme Court's cursory, "no merit" state habeas ruling, the proper standard of review is *de novo*. Respondent objects to the Magistrate Judge's determination that mixed questions of law and fact (e.g. Petitioner's ineffective assistance of counsel claims) are to be reviewed *de novo*. Respondent argues that, under the AEDPA, state court findings both of fact and of law are subject to deferential review.

[19] Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by Petitioner, a state court decision that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Wright v. Angelone*, 151 F.3d 151, 156, No. 97–32, 1998 WL 394990, at *4 (4th Cir. July 16, 1998); *Hen-*

8. Even if the Court did not find the claim procedurally defaulted, the Court finds no merit in this claim. The Fourth Circuit previously addressed the identical claim, holding that such a claim does "not provide sufficient constitutional grounds to warrant a writ of habeas corpus." *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996).

9. The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. Virginia does not meet the qualifications of § 107, (Mem. Op. and Order, Dec. 6, 1996.), thus precluding its applicability to this case.

non v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va.1997) (holding that § 2254(d) does not require an explanatory decision from the state court).

Nevertheless, the practical significance of the § 2254(d) new standard of review is lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1015 (E.D.Va. 1997). In cases where there is no indication of *how* the state court came to its decision, it will obviously be more difficult for the federal court to determine whether the state court's ultimate determination involved an unreasonable application of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

If there is a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the *de novo* review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[10] However, the review of legal claims is still *de novo* in the sense that federal courts must independently determine whether the state court decision is correct under federal law. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the power of the federal judiciary to determine what the law is, as required by Article III of the United States Constitution. The AEDPA did, however, alter habeas review by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Petitioner must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

In *Green v. French*, 143 F.3d 865 (4th Cir.1998), the Fourth Circuit interpreted the meaning of "contrary to" and "unreasonable application of."

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

> [A] decision represents an "unreasonable application of" precedent only when that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that give rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id.

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The *Simmons* claim).

The Magistrate Judge recommended that Petitioner's case be remanded for resentencing on the basis that, on remand from the United States Supreme Court, the Virginia Supreme Court's decision, *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360, limited the application of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, in a manner inconsistent with the language in *Simmons*, required an inconsistent treatment of two separate convictions of Petitioner, and contradicted more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict. (R & R 113.) Respondent objects claiming that the Magistrate Judge clearly erred in recommending that the writ be granted on the basis of an error in state law. *See* 28 U.S.C. § 2254(d)(1). Petitioner does not object to the Magistrate Judge's recommendation, but expresses two (2) issues of concern.[11] First, Petitioner notes that, to the extent that Virginia state law was interpreted, the Magistrate Judge's decision was appropriate because the Virginia Supreme Court's decision was "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *See Richmond v. Lewis*, 506 U.S. 40, 50, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). Second, Petitioner clarifies that the right to inform the jury of his parole ineligibility status stemmed from both the Eighth Amendment and the Fourteenth Amendment.

The Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is **OVERRULED.** For the following reasons, the application for a writ of habeas corpus is GRANTED and Petitioner's case remanded to the Circuit Court for Fairfax County for resentencing.

1. Simmons v. South Carolina

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign in support of the imposition of the death penalty. The theme in all of the cases is dual. First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Eddings v. Oklahoma*, 455 U.S. 104,

10. Prior to passage of the AEDPA, review was *de novo* in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

11. Petitioner also noted his concern with the Magistrate Judge's determination that the Virginia Supreme Court possessed authority and jurisdiction to calculate Petitioner's parole ineligibility because such an issue is a mixed question of law and fact. The Court, however, has determined that argument to be procedurally defaulted. *See supra* III.G.

102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Second, a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, *see Simmons; Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the opportunity to rebut the same. *See Simmons; McCleskey; Skipper; Lockett; Gardner.* In addition to these themes, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1993), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

In *Simmons*, the defendant was convicted of the murder of an elderly woman. The state relied solely on "future dangerousness" as the basis upon which the jury should consider whether the defendant should be sentenced to death or given life imprisonment as punishment for his crimes. *Simmons*, 512 U.S. at 157, 114 S.Ct. 2187. The petitioner, however, presented evidence that his future dangerousness was limited to elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. *Id.* at 158, 114 S.Ct. 2187. Further, the petitioner requested that the court instruct the jury that, in his case, "life imprisonment" did not permit parole. *Id.* "To buttress his request, [the] petitioner proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility," *id.*, and, additionally, Petitioner presented evidence that (1) jurors believe a convicted murderer sentenced to "life imprisonment" will eventually be released from prison and (2) jurors indicate that the amount of time a convicted murderer would actually spend in prison is an important factor in choosing between life and death. *Id.* at 159, 114 S.Ct. 2187.

The trial court, however, denied the petitioner's request for an instruction regarding parole ineligibility. Further, the court denied a request for an instruction which indicated that the petitioner would remain in jail for the balance of his natural life. *Id.* at 159–60, 114 S.Ct. 2187.

During deliberations in the sentencing phase of the case, the jury asked whether life imprisonment carried with it the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The court instructed the jury not to consider parole in reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Id.* Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue before the United States Supreme Court was whether the jury was entitled to know that the petitioner was ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. Justice Blackmun, writing for the plurality, stated:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163–64, 114 S.Ct. 2187. The opinion further stated: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165–66, 114 S.Ct. 2187.

Justice O'Connor, in an opinion concurring in the judgment and joined by Chief Justice Rehnquist and Justice Kennedy, stated:

> When the state seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177, 114 S.Ct. 2187.

2. "Unreasonable determination of the facts"

[20] In this case, on January 29, 1993, at the time of the jury's question, Petitioner had been tried and convicted by another jury of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut. Pursuant to that jury's recommendation, the court had imposed a sentence of seventy-six years. (1/29/93 Tr. at 133.) Additionally, on January 29, 1993, Petitioner had been tried and convicted of two counts of robbery and one count of the use of a firearm at a Domino's Pizza. That jury had recommended a sentence of eighteen years, but the court had not yet imposed the sentence.[12] (1/29/93 Tr. at 134.)

In its decision, the Virginia Supreme Court relied upon section 53.1–151(B1) of the Virginia Code, the statutory language establishing parole ineligibility in the event of three convictions for defined offenses. Section 53.1–151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (I) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (I), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The court found that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death," Petitioner had only two qualifying convictions—the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7–11 and murder of Kayani, the very offenses before the trial court for resolution. The court concluded that the Domino's Pizza conviction did not qualify under 53.1–151(B1) because even though the jury recommended that Petitioner serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the verdict) constitute a second predicate conviction? The Court finds no logical reason for the exclusion of the Domino's Pizza robbery conviction as a third conviction of Petitioner. From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

3. Unreasonable Application of Simmons

[21] In the course of deliberating on Petitioner's punishment, the jury sent the follow-

12. The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court. Moreover, on February 18, 1993, Petitioner also entered a plea and was convicted of the robbery of the Bragg Towers Hotel. The record does not indicate what disposition was made for the robbery of a cab driver.

ing question into the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.) At the time of Petitioner's trial, Virginia law precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (Va.1992).

The Commonwealth's immediate response to the jury's question was to advise the court of the language of the Model Jury Instruction 2.7000 which stated: "you are to decide what a just punishment is and not to concern yourself with what happens thereafter." (1/29/93 Tr. at 278.) In response thereto, Petitioner's counsel made the following statements:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court [sic] should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is—I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your sentence will be the legal sentence imposed in the case."
>
> I'm open to any other suggestions.

(1/29/93 Tr. at 278–79.)

The court responded by quoting the Virginia Model Jury Instruction and stating to defense counsel that "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that such an instruction had been given in the past, but further responded: "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/93 Tr. at 280.) The court sustained the Commonwealth's objection [13] and informed the jury that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences. The jury responded by recommending that Petitioner be sentenced to death. (*Id.* at 281.)

On direct appeal, Petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of capital murder, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution. The assignment of error was rejected on direct appeal. *Ramdass*, 450 S.E.2d at 361.

In a petition seeking a writ of *certiorari* from the United States Supreme Court, the issue was raised in the context of the court's refusal to inform the jury of Petitioner's parole status. That petition for *certiorari* was granted. On remand, the sole issue before the Virginia Supreme Court was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that *Simmons* was not an issue because Petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994).

13. At this point, trial counsel was not obligated to offer or argue for a specific instruction contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir.1996).

Writing for the court, Justice Whiting stated, in pertinent part:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1–151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1–151(B1).
>
> (2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1–151(B1).
>
> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1–151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592–93, 113 S.E. 707, 709 (1922)(jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence.

Id. at 361.

Petitioner's case is not unlike the *Simmons* case. In both, the prosecution relied solely upon the "future dangerousness" prong of the statutory standard to establish the necessity of imposition of the death penalty. In both, the juries explicitly asked whether the defendant would be paroled if sentenced to life imprisonment. In both, the trial court gave obtuse answers that left the juries to speculate about the meaning of life imprisonment and the probability of the accused being released from incarceration. Under these parallel circumstances, the United States Supreme Court determined that evidence of parole ineligibility is clearly relevant to rebut future dangerousness. Nevertheless, the Virginia Supreme Court determined that *Simmons* did not apply to Petitioner's case because, in the court's estimation, Petitioner was not parole ineligible. The Virginia Supreme Court made this determination, despite the obviously illogical factual basis upon which it was determined that Petitioner was parole eligible and despite the United States Supreme Court's admonition that juries should not be left to speculate about parole eligibility versus life imprisonment. This, the Court finds to be an unreasonable application of *Simmons*.

Moreover, by concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*. Even assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1–151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at 162, 114 S.Ct. 2187.

4. Conclusion

For the aforementioned reasons, the Court finds that the judgment of the Virginia Su-

preme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is **OVERRULED**, and Petitioner's case is **REMANDED** to the Circuit Court of Fairfax County for resentencing.

B. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

Petitioner asserts numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a litigant must prove both: "(1) deficient performance and (2) prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, a litigant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. That is, a litigant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. To prove prejudice, the litigant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Failure to meet either prong defeats a litigant's ineffective assistance of counsel claim. *Id.* at 700, 104 S.Ct. 2052. A court need not address both components of the test if the litigant makes an insufficient showing on one part of the test. *Id.* at 697, 104 S.Ct. 2052.

1. Trial counsel's trial strategy was non-existent or internally inconsistent.

This claim consists of two parts: the procedurally defaulted claim of ineffectiveness for presentation of inconsistent defenses [14] and the preserved claim of ineffectiveness for failure to produce intent evidence. Only the latter will be addressed here. Petitioner's claim that his trial counsel was ineffective for failing to produce intent evidence is comprised of four (4) underlying claims: (I) Petitioner was unreasonably advised not to testify, thereby failing to confront the prosecution's argument that the gun was fired twice and in an upward position; (ii) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner; (iii) trial counsel failed to cross examine the prosecution's firearms identification expert; and (iv) trial counsel failed to obtain an expert who would help them present their theory of the case. Characterizing these claims as "Monday-morning quarterbacking," the Magistrate Judge concluded that each of the claims was without merit.

[22] With respect to the first and second sub-issues, Petitioner objects arguing that the Magistrate Judge failed to consider the affidavits of trial counsel wherein it was stated that these trial strategy choices were unreasonable and highly prejudicial. Even assuming Petitioner was prejudiced by not testifying, it is not deficient performance to advise one's client not to testify. *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir.1983). Therefore, the first prong is not satisfied because the performance did not fall below the objective standard of reasonableness.

[23] With respect to the third sub-issue, Petitioner objects arguing that the firearms identification expert was never qualified as a "ballistics expert," yet he testified about ballistics matters, and, further, that trial counsel admits in his affidavit that he failed to interview the expert and erroneously allowed him to testify outside his qualifications, thereby substantially proving the prosecution's case. Upon review, the Court finds that the Magistrate Judge's reasoning on these issues is proper. (R & R 45–53.) Neither the Court's nor trial counsel's hindsight is a basis upon which to find that an unsuccessful trial tactic constitutes deficient performance. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir.1995).

14. If the claim were not procedurally defaulted, the claim is nonmeritorious. *See Brown v. Dixon*, 891 F.2d 490 (4th Cir.1989).

With respect to the last sub-issue, Petitioner had two objections. First, he argued that it is improper to deny expert assistance yet rely on the absence of expert evidence to defeat a claim. And second, he contended that despite the Magistrate Judge's statement that testimony was undisputed on the issue of whether the gun was twice fired, Petitioner's own testimony in the penalty phase rebutted such evidence. The Court has already determined that the decision not to have Petitioner testify in the guilt phase regarding his intent was not deficient performance. The fact that Petitioner testified in the sentencing phase does not vitiate the undisputed nature of the evidence offered in the guilt phase that the trigger was pulled two times. Accordingly, Petitioner's objection is **OVERRULED**. This claim lacks merit.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

[24] Citing *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (Va.1979), the Magistrate Judge determined that it was not ineffective assistance to permit co-defendant Singh to testify regarding his life sentence. (R & R 53–54.) *Coppola* held that a defendant is not entitled to offer evidence that an equally culpable co-defendant had received sentence of life instead of a death sentence. *Id.* Petitioner objects arguing that the Magistrate Judge's reliance on *Coppola* is erroneous because Singh was not the triggerman and, therefore, could not have been sentenced to the death penalty. Petitioner is correct that Singh was not eligible for the death penalty. Va.Code § 18.2–18. Nevertheless, whether such testimony prejudiced the jury is highly speculative. Without a modicum of proof, Petitioner claims that without the testimony there is a "reasonable probability that the jury would not have felt obligated to impose a harsher sentence" on Petitioner. Accordingly, Petitioner's objection is **OVERRULED**.

3. Trial counsel failed to conduct adequate voir dire.

With respect to Ross, Powell and Amelia, the Magistrate Judge concluded that trial counsel were not ineffective because (1) they challenged Ross and Powell but the trial judge overruled the challenges, (2) Powell was struck with a peremptory challenge, (3) Ross was the alternate and excused prior to deliberations and (4) Amelia was not selected to serve. (R & R 56.) Petitioner objects claiming that these jurors were legally unqualified to serve and, thus he was entitled either to have them stricken by the trial judge or to receive additional peremptory strikes. The Court finds that the trial judge was within his discretion to deny the challenges, *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), and that even if trial counsel had requested additional peremptory strikes (which they did not), there is no evidence that a biased jury was impaneled, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Accordingly, Petitioner's objection is **OVERRULED**.

With respect to Petitioner's claim that trial counsel failed to adequately *voir dire* all the jurors on whether they would consider mitigating factors, the Magistrate Judge mentioned only that the Virginia Supreme Court had denied the claim on the merits. (R & R 56.) Petitioner objects claiming that the fact that some of the jurors indicated that they would not consider age or education to be mitigating factors raises a strong inference that other jurors also would not and, therefore, Petitioner is entitled to an evidentiary hearing in order to present such evidence. The Court finds that the claim is nonmeritorious. The transcript reveals that many, if not all, of the jurors were asked if they could consider age and/or education as mitigating factors and, additionally, if they could follow the trial court's instructions regarding mitigating factors. (Tr. 1/26/98 111–13, 118–19, 134, 139, 142–43, 170–71, 185, 188, 193, 221–22, 238.) All indicated that they could follow the court's instructions, even if contrary to their personal opinions. For those few not asked the above questions, counsel made an unchallengeable tactical choice not to inquire. Accordingly, Petitioner's objection is **OVERRULED**.

4. Trial counsel conceded the sole aggravating factor in the penalty phase.

[25] During sentencing, trial counsel stated in his opening that Petitioner was a bad

man and might commit crimes in the future. Petitioner argues that these statements effectively conceded future dangerousness; therefore, trial counsel was ineffective. The Magistrate Judge determined that, pursuant to *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir.1990), the statements did not constitute ineffective assistance of counsel because they were consistent with maintaining credibility with the jury. Petitioner objects arguing that *Clozza* holds that concessions are acceptable only in some cases and that this is not such a case because trial counsel conceded the very element the prosecution was required to prove beyond a reasonable doubt. The Court finds that trial counsel's statements do not constitute deficient performance. Trial counsel's theory was that no one could know whether Petitioner might commit crimes if he was on the street, but that Petitioner did not represent a future danger to society because he would spend the rest of his natural life in jail for the string of crimes for which he had been convicted. The allegedly improper statements are consistent with that theory and do not constitute deficient performance. Accordingly, Petitioner's objection is **OVERRULED.**

5. Trial counsel failed to adequately prepare for the penalty phase.

[26] The Magistrate Judge determined that this claim consisted of two arguments: claims regarding the trial court's appointment of a mental health expert and other miscellaneous claims. For the reasons stated by the Magistrate Judge, (R & R 59–62.), the Court rejects the miscellaneous arguments regarding inadequate preparation. Trial counsel presented evidence of Petitioner's dysfunctional childhood through testimony by Petitioner, Petitioner's brother and mother and a probation officer who had worked with Petitioner. Although reasonable counsel may have chosen to present such evidence in a different manner, trial counsel's choice does not constitute deficient performance.

[27] With respect to the mental health expert, Petitioner objects to the Magistrate Judge's conclusion, arguing that trial counsel was ineffective for not researching the appointed mental-health expert's background, thereby learning of his allegedly pro-prosecution bias, and for not objecting to the trial court's selection. Even assuming that counsel was deficient in not objecting to the court-appointed expert, the Court finds that Petitioner was not prejudiced. Under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), an indigent defendant is entitled to the appointment of a mental health expert when his legal sanity is likely to be a significant issue at trial. Va.Code. § 19.2–264.3:1 provides in pertinent part:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

The court-appointed expert neither found that Petitioner's sanity was at issue nor determined that Petitioner's history or character was a mitigating factor. Evidence regarding Petitioner's history and character, however, was presented through Petitioner, his mother and brother, and a probation officer. Further, Petitioner's repeated involvement in the criminal justice system had resulted in several mental evaluations which were consistent with each other. Evidence of these evaluations was presented through the probation officer. Finally, at no time has a mental evaluation of Petitioner revealed evidence that Petitioner was (or is) operating under a mental disease or defect which would

render him unaccountable for his behavior. Accordingly, the Court finds that Petitioner was not prejudiced by any failure to object to the court-appointed expert or obtain an independent mental health evaluation. Accordingly, Petitioner's objection is **OVERRULED.**

C. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that the trial court was within its discretion in denying the requests for a medical doctor and expert investigator. (R & R 63.) Petitioner objects to the finding as to the medical expert. Petitioner argues that the trial court's denial of a medical expert on the grounds that "no medical evidence had been presented was an exercise in pretzel logic." The Court finds that the trial judge's decision was not unreasonable in light of the lack of evidence Petitioner presented to justify his need for medical evaluation. Accordingly, Petitioner's objection is **OVERRULED.**

D. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an *ex parte* showing of need for expert assistance.

[28] The Magistrate Judge determined that this claim was without merit because there was no constitutional entitlement to *ex parte* hearings on requests for the appointment of experts, and, if there is, such right would constitute a new rule that was not in place at the time of Petitioner's trial. (R & R 68.) Petitioner objects arguing that the requirement of an *ex parte* proceeding is firmly established by both the Supreme Court and the lower courts.

Under federal criminal procedure, when a defendant requests expert assistance, there is clearly a statutory right to an *ex parte* hearing. 18 U.S.C. § 3006A(e)(1). The appropriateness of conducting *ex parte* hearings is obvious: a defendant should not be forced to disclose its evidence and strategy to the prosecution. In *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, the United States Supreme Court recognized the need for an *ex parte* hearing, but did not hold that such a hearing is constitutionally required. Consequently, the adoption of such a rule at this point in Petitioner's case would be a new rule which, generally, should not be created on collateral review. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). Accordingly, the objection is **OVERRULED.**

E. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements *in camera* and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's determination of this claim. Accordingly, the Court adopts the Magistrate Judge's rationale, (R & R 70–73.), which is reiterated herein in pertinent part. For the following reasons, the Court finds this claim to be nonmeritorious.

[29] Petitioner's claim has three components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made to the police by Petitioner's co-defendants and other prospective witnesses, including inculpatory and inconsistent statements made by co-defendants. The third is the trial court's refusal to conduct an *in camera* review. With respect to the first claim, polygraph material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159, 167 (1986). Moreover, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the *Brady* rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

[30] With respect to the second claim, in order for a *Brady* violation to occur, the material sought must be "material." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is "materi-

al" under *Brady* "only where there exists a 'reasonable probability'" that had the evidence been disclosed the result at trial would have been different. *Wood*, 516 U.S. at 5, 116 S.Ct. 7. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Here, counsel has not demonstrated that the withheld material undermines the confidence in the outcome of this trial.[15]

With respect to the third claim, the trial court did not commit error by refusing to examine the prosecution's file *in camera* to determine the presence of exculpatory material. In *Rowe v. Grizzard*, 591 F.Supp. 389 (E.D.Va.1984), similar to this case, defense counsel asked for "statements made by co-defendants and witnesses which either contradicted others' statements and/or were internally inconsistent." *Id.* at 398. The trial court refused, noting the prosecution's burden to comply with *Brady*. *Id.* In denying the federal habeas petition, the district court stated: "Absent a more specific request than was made, the trial court is not required to make an *in camera* inspection of the prosecution's entire file." *Id.*

F. The Virginia death penalty statutes on their face, and as applied, violate the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77–85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious. The Fourth Circuit has denied claims similar to Plaintiff's preserved claims regarding jury consideration of mitigation evidence and consideration of unadjudicated misconduct. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995). Accordingly, Petitioner's objection is **OVERRULED.**

G. Petitioner was denied his right to confrontation in violation of the sixth amendment.

[31] Petitioner claims that he was denied the right of confrontation in the course of cross-examining co-defendant Ramirez because the trial court sustained prosecution objections to defense questions concerning Ramirez' character and the location of fingerprints at the crime scene. The Magistrate Judge determined that the claim was nonmeritorious because only issues of state criminal procedure and evidence were challenged and such issues did not rise to a constitutional level. (R & R 85–86.) Petitioner objects arguing that the wholesale sustaining of objections prevented adequate cross examination on Ramirez' character and propensity for criminal conduct, thereby affecting the jury's verdict(s) with respect to guilt and/or sentencing.

No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. The judgment of the trial court in denying certain questions it found to be prejudicial or irrelevant was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. As the United States Supreme Court noted in *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Accordingly, Petitioner's objection is **OVERRULED.**

H. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that Virginia law permits the use of unadjudicated

15. Moreover, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 n. 4 (4th Cir.1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir.1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir.1990). Petitioner has not asserted that he had no other means of obtaining the material which was withheld.

criminal conduct in the sentencing phase. (R & R 86.) Citing *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), Petitioner objects arguing that the federal constitution requires that the prosecution prove by a preponderance of the evidence that the defendant committed the unadjudicated conduct. In *Nichols*, the Supreme Court held that the federal due process clause requires in a non-capital, federal action that previous conduct being used to enhance a sentence be proved by a preponderance of the evidence. *Id.* 114 S.Ct. at 1928.

[32] The Court finds that Petitioner's argument, if accepted, would create a new rule which was not in effect at the time his conviction became final. *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257. The United States Supreme Court has repeatedly refused to determine the issue of whether unadjudicated criminal conduct can be introduced in the sentencing phase of a capital trial.[16] At the time of Petitioner's trial, Virginia statutory law permitted the introduction of such evidence when certain notice requirements are met. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (Va.1985); *see also Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995). Virginia law, however, did not require that the prosecution prove the conduct by any standard. *See Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (Va.1987). Because federal courts generally do not create new rules or apply new constitutional rights on collateral review, *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257, Petitioner's claim must fail. Accordingly, Petitioner's objection is **OVERRULED.**

I. Virginia's capital murder sentencing statute is unconstitutional.

[33] The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77–85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious as the statute is not unconstitutionally vague. The Fourth Circuit has denied Plaintiff's preserved claims that the "future dangerousness" prong of the Virginia capital sentencing statute is unconstitutional on that ground. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995) (finding that "future dangerousness" may be determined using unadjudicated misconduct); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995) (stating that Virginia is a "non-weighing" state, i.e. its statutory scheme narrows the class of persons eligible for death penalty and a weighing instruction is not required by the federal Constitution); *Spencer v. Murray*, 5 F.3d 758 (4th Cir.1993) (finding that "future dangerousness" prong is not vague). Accordingly, Petitioner's objection is **OVERRULED.**

V. REQUEST FOR EVIDENTIARY HEARING

Whether an evidentiary hearing is required is determined in light of the petition, the answer, the transcript and record of state court proceedings, and any expanded record evidence. *See* Rule 8, Rules Governing § 2254 Cases. If a hearing is not required, "the judge shall make such disposition of the petition as justice shall require." The Court finds that the facts presented in the record, transcripts of the state court proceedings, the affidavits of trial counsel and experts, and the arguments presented in the pleadings lead to the conclusion that an evidentiary hearing is not required to address the claims raised by Petitioner. Accordingly, the request for an evidentiary hearing is denied.

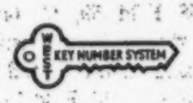
VI. CONCLUSION

The Court, having examined the objections to the Magistrate Judge's R & R, and having reviewed the record and conducted a *de novo* review of those portions objected to, does hereby order that the petition be **GRANTED**

16. In *United States v. Beckford*, 964 F.Supp. 993 (E.D.Va.1997), the court considered the issue of whether unadjudicated criminal conduct is admissible in a federal capital case. It indicated that the states are divided over the issue. As of 1993, six (6) states permit the use of such evidence almost without limitation; ten states require certain procedural safeguards; and eight states absolutely prohibit the introduction of such evidence. *See* Steven Paul Smith, Note, *Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 Colum.L.Rev. 1249, 1250 (1993).

and that Respondent's motion to dismiss be DENIED. Petitioner's case is REMANDED to the Circuit Court of Fairfax County for re-sentencing in light of the Court's rulings herein.

It is so ORDERED.



David G. LAMB, Plaintiff,

v.

QUALEX, INC., Defendant.

No. Civ.A. 3:98CV413.

United States District Court,
E.D. Virginia,
Richmond Division.

Dec. 16, 1998.

Former employee with depression brought action against former employer alleging violations of the Americans with Disabilities Act (ADA). Employer moved for summary judgment. The District Court, Richard L. Williams, Senior District Judge, held that: (1) employee was judicially estopped from claiming to be a qualified individual with a disability under ADA, and (2) employer was not liable to employee under ADA.

Motion granted.

1. Estoppel ⇐68(2)

"Judicial estoppel" is an equitable doctrine that prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

2. Estoppel ⇐68(2)

Application of judicial estoppel is appropriate in ADA action when the prior proceeding is a Social Security Administration (SSA) application for disability benefits. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

3. Estoppel ⇐68(2)

Former employee suffering from depression was judicially estopped from claiming to be a qualified individual with a disability under ADA; employee claimed to be a qualified individual with a disability capable of at least part-time work, which was factually incompatible with position he had taken in prior Social Security Administration (SSA) proceeding that he was completely unable to work, his prior position was accepted by SSA, and the two directly contradictory positions were advanced for purpose of gaining unfair advantage in proceedings governed by divergent standards. Americans with Disabilities Act of 1990, §§ 101(8), 102, 42 U.S.C.A. §§ 12111(8), 12112.

4. Civil Rights ⇐173.1

In ADA action, employee bears the burden of demonstrating that he could perform the essential functions of his job. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; 29 C.F.R. § 1630.2(n)(1).

5. Civil Rights ⇐173.1

The ADA requires only that employers adopt accommodations that are reasonable. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

6. Civil Rights ⇐173.1

If employee with disability cannot perform the essential functions of his position with reasonable accommodations, then he is not entitled to relief under the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

7. Civil Rights ⇐173.1

The ADA does not require that an employer create a position to accommodate a disabled employee. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

8. Civil Rights ⇐173.1

Accommodation of employee with a disability imposes an "undue hardship" on em-

Bobby Lee RAMDASS

v.

COMMONWEALTH of Virginia.

No. 930693.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Fairfax County, Quinlan H. Hancock, J., of murder, robbery, and weapons offenses, and was sentenced to death. Defendant appealed. The Supreme Court, 246 Va. 413, 437 S.E.2d 566, affirmed. The United States Supreme Court, 114 S.Ct. 2701, granted certiorari, vacated judgment, and remanded case. On remand, the Virginia Supreme Court, Whiting, J., held that defendant had not yet been convicted of three separate felony offenses at time of penalty phase of capital murder trial and, thus, had not been rendered statutorily ineligible for parole which would have entitled jury to information on defendant's potential for parole for purposes of considering his future dangerousness.

Circuit Court judgment affirmed, and conviction and sentence reinstated.

Homicide ⇐311

Defendant had not yet been convicted of three separate felony offenses at time of penalty phase of capital murder trial and, thus, defendant had not been rendered statutorily ineligible for parole which would have entitled jury to information on defendant's potential for parole for purposes of considering his future dangerousness; jury in another case had found defendant guilty of third felony but judgment had not been entered on that verdict. Code 1950, § 53.1–151, subd. B1.

Michael S. Arif, Burke (Leonard R. Piotrowski; Sharon B. Soloway, Martin, Arif & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

WHITING, Justice.

Bobby Lee Ramdass pleaded guilty to the robbery of Mohammad Z. Kayani immediately preceding his trial for the capital murder of Kayani. The capital murder charge was predicated on Ramdass's alleged murder of Kayani in the commission of robbery while armed with a deadly weapon, Code § 18.2–31(4), and the use of a firearm in the commission of Kayani's murder, Code § 18.2–53.1. The trial court deferred action on Ramdass's guilty plea.

In a bifurcated jury trial conducted under the provisions of Code §§ 19.2–264.3 and –264.4, Ramdass was convicted of Kayani's capital murder. In the second phase of the trial, the jury fixed Ramdass's punishment at death, based upon the "future dangerousness" predicate of Code § 19.2–264.2.

Following consideration of a probation officer's report, the court imposed the death sentence fixed by the jury. The court also imposed a life sentence based upon its finding of Ramdass's guilt for Kayani's robbery and imposed the four-year sentence fixed by the jury for the firearms violation. We affirmed those judgments and the sentence to death. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993).

In a summary disposition, the Supreme Court granted Ramdass's petition for a writ of certiorari on June 20, 1994, vacated the judgment, and remanded the case to this Court "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. ——, 114 S.Ct. 2187 [129 L.Ed.2d 133] (1994)." *Ramdass v. Virginia*, —— U.S. ——, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Accordingly, by order entered July 29, 1994, we placed this case on our September 1994 docket with directions for appropriate briefing and argument.

We rejected Ramdass's contention in his earlier appeal that the trial court erred in not answering the jury's question, "If the defendant is given life, is there possibility of parole

at some time before his natural death?" *Ramdass*, 246 Va. at 425, 437 S.E.2d at 573. We did so because of our established rule that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Id.* at 426, 437 S.E.2d at 573.

In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ——, 114 S.Ct. at 2198. Hence, *Simmons* applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1–151(B1) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1–151(B1). They were:

(1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1–151(B1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1–151(B1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1–151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592–93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

Affirmed.

KEY NUMBER SYSTEM

Dwayne Allen WRIGHT,

v.

COMMONWEALTH of Virginia.

Record Nos. 920810 and 920811.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant who was 17 years old was tried as adult in the Circuit Court, Fairfax County, J. Howe Brown, J., and convicted of two counts of capital murder, robbery, use of firearm in commission of robbery, and attempted rape. Defendant received death penalty. Appeal was taken. The Supreme Court, 245 Va. 177, 427 S.E.2d 379, affirmed. The United States Supreme Court, 114 S.Ct. 2701, granted certiorari, vacated judgment, and remanded case. On remand, the Supreme Court, Stephenson, J., held that defendant's criminal record did not include convictions of three separate felony incidents of type specified in parole ineligibility statute and, thus, trial court could refuse to inform jury about defendant's potential for parole for purposes of considering his future dangerousness.

No. 93–5044. WRIGHT *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons* v. *South Carolina*, *ante*, p. 154. Reported below: 245 Va. 177, 427 S. E. 2d 379.

No. 93–8309. RAMDASS *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons* v. *South Carolina*, *ante*, p. 154. Reported below: 246 Va. 413, 437 S. E. 2d 566.

Miscellaneous Orders

No. ———. CABAL *v.* I. T., INC.; and
No. ———. THREATT ET AL. *v.* FULTON COUNTY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ———. DURDEN *v.* UNITED STATES. Motion of Jon M. Hunter for leave to intervene in order to file petition for writ of certiorari denied.

No. ———. DUNKIN ET AL. *v.* LOUISIANA-PACIFIC CORP. ET AL. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. A–955. MORRISON *v.* UNITED STATES. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1379. IN RE DISBARMENT OF FRESCO. Disbarment entered. [For earlier order herein, see 511 U. S. 1016.]

No. D–1410. IN RE DISBARMENT OF VANDER VORT. It is ordered that Wayne A. Vander Vort, of Minneapolis, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1411. IN RE DISBARMENT OF KARSCH. It is ordered that Stephen Elias Karsch, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

ticipated testimony. *Whittaker v. Commonwealth*, 217 Va. 966, 968–69, 234 S.E.2d 79, 81 (1977); *Scott v. Commonwealth*, 191 Va. 73, 78–79, 60 S.E.2d 14, 16 (1950); *Owens v. Commonwealth*, 147 Va. 624, 630–31, 136 S.E. 765, 767 (1927). However, he made no attempt to do so following the trial court's ruling that this type of evidence was inadmissible for purposes of impeaching the witness.

The trial court did not refuse to allow counsel to make a proffer. Rather, when counsel failed to make a proffer and apparently had nothing more to say on the subject, the trial court simply stated, "All right, move on." This statement by the trial court does not constitute a refusal to allow a proffer. The majority's strained interpretation to the contrary creates confusion as to who bears the ultimate responsibility to complete the record for appeal. A standard that requires the trial court to remind counsel to make a proffer suggests a retreat from our long-established rule placing responsibility for the record on counsel.

Since the record before us does not contain the substance of Daniel Sydow's anticipated testimony, and since the substance of that testimony is necessary for review of the error assigned, I would affirm the trial court's judgment.

Bobby Lee RAMDASS,

v.

COMMONWEALTH of Virginia.

Record No. 930693.

Supreme Court of Virginia.

Nov. 5, 1993.

Defendant was convicted in the Circuit Court, Fairfax County, Quinlan H. Hancock, J., of murder, robbery, and weapons offenses, and was sentenced to death. Defendant appealed. The Supreme Court, Whiting, J., held that: (1) defendant failed to establish necessary constitutional materiality to require pretrial production of his accomplices' polygraph test, either for his inspection or for court's in-camera inspection; (2) defendant did not have constitutional right to ex parte hearing on his motion for appointment of medical doctor and private investigator to assist in his defense; (3) defendant was not entitled to immediate adjudication of guilt on robbery charge; (4) refusing to permit defendant to impeach witnesses by questioning their involvement in several unadjudicated crimes did not violate defendant's confrontation rights; and (5) death sentence was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of similar nature.

Affirmed.

1. Indictment and Information ⇐121.1(2)

Trial court did not err in denying defendant's motion for bill of particulars in capital murder trial, where indictment described offenses charged in conformity with statutory requirements. Code 1950, § 19.2–220.

2. Criminal Law ⇐700(3)

Defendant failed to establish necessary constitutional materiality to require pretrial production of his accomplices' polygraph test, either for his inspection or for court's in-camera inspection; although defendant claimed he was denied opportunity to meaningfully cross-examine accomplices and might have been able to impeach their credibility if he had access to test, he failed to show that answers given by accomplices during tests would be favorable to him and material to his guilt or punishment. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐700(2.1, 4)

Fairness to defendant requires Commonwealth's pretrial production of exculpatory evidence under Due Process Clause of Fourteenth Amendment of the United States Constitution; evidence that impeaches credibility of Commonwealth's witness is exculpatory evidence. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐627.5(1), 700(2.1)

There is no general constitutional right to discovery in criminal case, and *Brady* does not establish one. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐700(2.1)

In order to establish that Commonwealth has violated defendant's *Brady* rights, record must indicate that undisclosed evidence was in fact exculpatory and material either to guilt or punishment. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐268.2(3)
Costs ⇐302.3, 302.4
Criminal Law ⇐393(1), 662.1

Indigent defendant did not have constitutional right to ex parte hearing on his motion for appointment of medical doctor and private investigator to assist in his defense in capital murder case; denial of request did not violate defendant's Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, and his Fourteenth Amendment rights to due process, and his rights under Virginia Constitution. U.S.C.A. Const.Amends. 5, 6, 14; Const. Art. 1, §§ 8, 9; 18 U.S.C.A. § 3006A(e).

7. Criminal Law ⇐994(3)

Defendant charged with capital murder, robbery and weapons charges, who pled guilty to robbery on first day of trial, was not entitled to immediate adjudication of guilt on robbery charges, despite defendant's claim that he could have established his ineligibility for parole because of prior convictions; court found defendant guilty of robbery before sentencing phase, and evidence of defendant's parole ineligibility was inadmissible in any event. Code 1950, §§ 19.2–299, 53.1–151, subd. B1; U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐662.7

Refusing to permit defendant to impeach witnesses by questioning their involvement in several unadjudicated crimes did not violate defendant's confrontation rights under United States and Virginia Constitutions in capital murder case. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 8; Code 1950, § 19.2–269.

9. Criminal Law ⇐778(2), 782(4)

Burden of proof instruction given in capital murder trial, requiring jury to limit its considerations to evidence introduced, did not preclude jurors from using their common sense in deciding whether Commonwealth had carried its burden of proof; instruction relating to jury's duty to weigh the evidence specifically told jurors they were entitled to use their common sense in judging any testimony.

10. Criminal Law ⇐829(21)

Defendant's proposed instruction, including first-degree murder as lesser-included offense of capital murder charge if Commonwealth failed to prove that killing was "willful, deliberate and premeditated," was duplicative of separate finding instructions that court granted in essentially same language as proposed instruction, one dealing with capital murder and the other dealing with first-degree murder.

11. Criminal Law ⇐863(1)

Trial court properly refused to respond to jury's question proposed during sentencing phase of capital murder trial regarding whether there was possibility of parole if defendant was given life sentence; court appropriately responded by telling jury that it should impose such sentence as it felt was just under evidence and within instructions of court and not to concern themselves with what would happen afterwards.

12. Homicide ⇐356

Death sentence imposed on defendant who killed victim during robbery of convenience store was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of similar nature; defendant had long history of criminal activities, including other robberies accompanied by physical violence.

Michael S. Arif, Burke (Sharon B. Soloway, Martin, Arif, DeWilde & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (Stephen D. Rosenthal, Atty. Gen., on brief), for appellee.

WHITING, Justice.

In September 1992, Bobby Lee Ramdass was indicted for the murder of Mohammad Z. Kayani in the commission of a robbery while armed with a deadly weapon, the robbery of Kayani, and the use of a firearm during Kayani's murder. Prior to a jury trial, Ramdass pled guilty to the robbery of Kayani and, over Ramdass's objection, the court deferred action on his guilty plea.

Thereafter, in a bifurcated trial conducted under the provisions of Code §§ 19.2–264.3 and –264.4, a jury convicted Ramdass of the capital murder of Kayani and fixed his punishment at death predicated upon a finding of "future dangerousness." The jury also convicted Ramdass of the use of a firearm in the commission of Kayani's murder and fixed his punishment at imprisonment for four years.[1]

After the jury returned its guilty verdicts, the court found Ramdass guilty of Kayani's robbery and referred the robbery and weapon convictions to the district probation officer for a presentence investigation and report. Following the jury's verdict of death in the sentencing phase of the capital murder charge, the court referred the case to the district probation officer for "investigation and report before sentencing." Code § 19.2–264.5. Upon consideration of the probation officer's report covering all three charges, the court sentenced Ramdass to life imprisonment upon the robbery charge and imposed the sentences fixed by the jury on the remaining charges.

Ramdass is before the Court for automatic review of his death sentence, and we have consolidated that review with the appeal from his capital murder conviction. Code § 17–110.1.

FACTS

Because the Commonwealth prevailed in the trial court, we will view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth. *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980).

During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7–Eleven store on Buelah Street in Fairfax County.

Accordingly, near one o'clock on the morning of September 2, the five men entered the 7–Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7–Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.

After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f——— head off."[2] Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.

Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.

1. The jury was authorized to fix a four-year term of imprisonment for the firearm violation because it was Ramdass's second conviction for that offense. Code § 18.2–53.1.

2. Another employee of the 7–Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?" After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."

Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

ISSUES PREVIOUSLY RESOLVED

Ramdass assigns a number of errors and makes arguments that have been answered in previous decisions of this Court. Ramdass does not offer sufficient reasons to justify a modification of our previously expressed views. Therefore, we will reaffirm our earlier decisions and reject Ramdass's contentions as follows:

A. The court's denial of Ramdass's request for appointment of a medical doctor and an investigator at state expense violated his Fourteenth Amendment Due Process and Equal Protection rights. Answered by *O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *Gray v. Commonwealth*, 233 Va. 313, 329–30, 356 S.E.2d 157, 166, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

B. The court's application of Code § 19.2–264.4(C) in the admission of evidence of unadjudicated criminal conduct in the sentencing phase violates the Eighth and Fourteenth Amendments of the United States Constitution. Answered by *Watkins v. Commonwealth*, 238 Va. 341, 351–52, 385 S.E.2d 50, 56–57 (1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797, 108 L.Ed.2d 798 (1990).

C. The court's admission of evidence of unadjudicated criminal conduct is unconstitutional under any circumstances because of the requirement of a "greater degree of reliability where the death sentence is imposed." Answered by *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993), and *Stockton v. Commonwealth*, 241 Va. 192, 210, 402 S.E.2d 196, 206, *cert. denied* — U.S. —, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

D. The court's refusal of Ramdass's proffered jury instruction that required proof of unadjudicated criminal conduct beyond a reasonable doubt violated his due process rights. Answered by *Stockton*, 241 Va. at 210, 402 S.E.2d at 206.

E. The court's denial of Ramdass's motion to declare unconstitutional the provision of Code § 53.1–233 providing for execution of prisoners by electrocution violates the prohibitions against cruel and unusual punishment contained in the United States and Virginia Constitutions. Answered by *Poyner v. Commonwealth*, Order entered in Record Number 930301 on March 10, 1993, and *Boggs v. Commonwealth*, Order entered in Record Number 900967 on July 18, 1990 (both orders rejected same arguments of unconstitutionality that used essentially same background materials relied upon by Ramdass as to execution by electrocution generally and "as carried out in Virginia's electric chair"); *Stockton v. Commonwealth*, 241 Va. at 215, 402 S.E.2d at 209–10; *Martin v. Commonwealth*, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980); *Hart v. Commonwealth*, 131 Va. 726, 743, 109 S.E. 582, 587 (1921).

ASSIGNMENTS OF ERROR WAIVED

Ramdass did not brief, and has therefore waived, Assignments of Error Numbers Seven, Seventeen, Eighteen, Nineteen, Twenty, and Twenty-four. Rule 5:27(e).

PRETRIAL MOTIONS

Motion for Bill of Particulars

[1] Ramdass filed a motion for a bill of particulars seeking specific details of the evidence in support of the Commonwealth's case. However, the indictment described the offenses charged in conformity with the requirements of Code § 19.2-220 and, therefore, was sufficient to give Ramdass "notice of the nature and character of the offense[s] charged so he [could] make his defense." *Satcher*, 244 Va. at 231, 421 S.E.2d at 828 (quoting *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976)). Under these circumstances, the trial court did not err in denying Ramdass's motion for a bill of particulars.

Motion for Discovery of Accomplices's Polygraph Tests

[2] Ramdass contends that the trial court erred in denying both his motion for discovery of the questions, answers, and results of his accomplices's polygraph examinations and his subsequent oral motion for the court's *in camera* inspection of those tests. According to Ramdass, the Commonwealth was constitutionally required to produce these tests because they may have contained "potentially exculpatory evidence."[3] We do not agree.

[3, 4] Fairness to the defendant requires the Commonwealth's pretrial production of exculpatory evidence under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). And evidence that impeaches the credibility of a Commonwealth witness is exculpatory evidence. *Robinson v. Commonwealth*, 231 Va. 142, 150, 341 S.E.2d 159, 164 (1986) (citing *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985)). However, there is no general constitutional right to discovery in a criminal case, and *Brady* did not establish one. *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977)).

[5] In order to establish that the Commonwealth has violated a defendant's *Brady* rights, the record must indicate that the undisclosed evidence was in fact exculpatory and material either to guilt or to punishment. *Lowe*, 218 Va. at 679, 239 S.E.2d at 118. Nothing in this record indicates either that the Commonwealth's Attorney has withheld exculpatory information or that the answers given by Ramdass's accomplices in their polygraph tests would be favorable to him and material to his guilt or punishment.[4] Ramdass's speculation that such statements might contain "potentially exculpatory evidence" imposes neither a duty of disclosure upon the Commonwealth, *id.*, nor a duty of inspection *in camera* by the court. *United States v. Navarro*, 737 F.2d 625, 631-32 (7th Cir.), *cert. denied*, 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984).

During oral argument, counsel for Ramdass contended that without access to the polygraph examinations the defense could not show that these records contained exculpatory evidence which was material to guilt or punishment. Although a defendant need not make an avowal of *how* a witness might testify in order to obtain pretrial discovery of a witness's statement to police, he should describe the events to which the witness might testify and the relevance of such matters to the crime charged in order to demonstrate its required constitutional materiality to his guilt or punishment. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 871-72, 102 S.Ct. 3440, 3448-49, 73 L.Ed.2d

3. Ramdass concedes correctly that conclusory statements that any of these co-defendants may have been "deceptive" or "flunked" the polygraph examination are not admissible. *Robinson v. Commonwealth*, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).

4. The Commonwealth's Attorney advised Ramdass's attorney prior to trial that the answers of O'Connor, one of his accomplices, were deceptive in that he attempted to minimize his role in the 7-Eleven incident. The Commonwealth's Attorney also informed Ramdass's attorney of three persons who allegedly would provide an alibi defense, but he also advised that they had made inconsistent statements. We note that Ramdass did not call any of those persons as witnesses.

1193 (1982). Ramdass's only claims of materiality are: (1) that because he was denied access to the polygraph examinations, "meaningful cross-examination" of Singh and Ramirez was "straightjacketed," and (2) that he *might* have been able to impeach their credibility with "any additional information gleaned through investigation of leads created by the polygraph facts." However, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

Considering Ramdass's guilty plea to Kayani's robbery and Singh's uncontradicted testimony that Ramdass shot Kayani, we conclude that Ramdass has not established the necessary constitutional materiality to require the pretrial production of the polygraph tests either for his inspection or for the court's *in camera* inspection. Hence, the trial court did not err in denying Ramdass's discovery motions relating to those tests.

Ramdass's Motion for Ex parte Hearing Relating to Experts

[6] Ramdass, an indigent, maintains that the court erred in denying an *ex parte* hearing of his motion for the appointment of a medical doctor and a private investigator to assist in his defense.[5] Ramdass argues that because he must make "a threshold showing of the significance of the expert's testimony" to obtain such appointments, an *ex parte* hearing is required to avoid a disclosure of his potential defenses to the Commonwealth's Attorney. Accordingly, Ramdass argues, the court's denial of his request violated his Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, his Fourteenth Amendment right to due process, and "Article I Section 8 and 9 of the Virginia Constitution."

However, Ramdass offers no persuasive argument or authority supporting this contention. Indeed, none of the cases he cites deals with the constitutional rights he asserts in this case. Most of those cases deal with the application of a federal statute creating a right to an *ex parte* hearing when an indigent requests expert assistance in a federal action. 18 U.S.C. § 3006A(e) (1993).

We perceive no reason to depart from our previous holding that there is no constitutional right to such a hearing. *O'Dell*, 234 Va. at 686, 364 S.E.2d at 499. Hence, we find no merit in this assignment.

THE ROBBERY CHARGE

[7] Before the venire entered the courtroom on the first day of trial, Ramdass pled guilty to the robbery of Kayani, offered to make a proffer of the evidence of his guilt and to waive his right to a presentence report, and moved the court to find him guilty and immediately sentence him. The Commonwealth's Attorney objected, contending that an immediate adjudication of guilt might raise an issue of Ramdass's right to assert a double jeopardy defense to the remaining charges. The court denied Ramdass's motion, deferred its adjudication of guilt and sentencing, and proceeded with the trial of the remaining charges.

After the Commonwealth rested its case in chief in the guilt phase of the trial, the court denied Ramdass's renewed motion for an adjudication of guilt on the robbery charge. When the jury returned a guilty verdict on the capital murder and weapon charges, the court found Ramdass guilty of all three charges. Ramdass again waived his right to a presentence report and moved the court to sentence him immediately. The court denied that motion. Instead, it referred the matter to a probation officer for a presentence investigation and report pursuant to the provisions of Code § 19.2-299.

According to Ramdass, the court violated his Fifth and Fourteenth Amendment rights in denying these motions. Had there been an immediate adjudication of his guilt in Kayani's robbery during the sentencing phase, Ramdass claims that he could have estab-

5. On brief, Ramdass contends that the court erred in failing to appoint "other expert witnesses," but the transcript does not reveal that he asked for any experts other than a doctor and a private investigator. Accordingly, we do not consider this contention. Rule 5:25.

lished his ineligibility for parole because of his three separate convictions of armed robbery. Code § 53.1-151(B1).[6] However, we need not decide whether the court abused its discretion in deferring Ramdass's conviction, because the court *had* found Ramdass guilty of the robbery before the sentencing phase.

Evidence of Ramdass's parole ineligibility was inadmissible in any event. We repeatedly have held that such evidence of parole ineligibility is inadmissible in capital murder cases. *Wright v. Commonwealth*, 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993). We perceive no reason to modify our views on this issue and, therefore, we find no violation of Ramdass's constitutional rights in delaying his adjudication of guilt.

GUILT PHASE

Limitation of Cross-Examination

[8] Ramdass contends that the court erroneously restricted his right of cross-examination in refusing to permit impeachment of Singh and Ramirez by questioning their involvement in several unadjudicated crimes. It is well settled in Virginia that a litigant's right to impeach the credibility of adverse witnesses by showing their participation in criminal conduct has been confined to questions about a conviction for a felony, perjury, and a misdemeanor involving moral turpitude. Code § 19.2-269 (felony and perjury; first enacted in 1919, Code § 4779 (1919)); *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961) (misdemeanor involving moral turpitude). This limitation upon a defendant's impeachment rights is a reasonably necessary measure to restrict the scope of a criminal trial. As we pointed out in *Clark*, admission of unadjudicated crimes for purposes of general impeachment of a witness would "lead to confusion in directing the jury's attention to collateral matters and away from the issues of the case." *Id.* at 790, 120 S.E.2d at 273.

Nevertheless, Ramdass claims that the trial court's adherence to this settled practice violated his confrontation rights under the Sixth Amendment of the United States Constitution and Article I, § 8 of the Virginia Constitution. He cites no authority to support such an expansive application of these rights, and we have found none. *Cf. Brown v. Commonwealth*, 246 Va. ——, ——, 437 S.E.2d 563, 564-65 (1993) (this day decided). Accordingly, we conclude that the trial court did not err in this limitation of Ramdass's cross-examination.

Next, Ramdass maintains that the trial court erred in refusing to permit him to ask Ramirez: "Did it surprise you that there were no fingerprints found [in the back room where Ramirez said he was when Ramdass shot Kayani]?" We find no abuse of the court's discretion in excluding such evidence; whether Ramirez was surprised would not be probative.

Instructions

[9] Ramdass contends that the trial court erroneously included the emphasized language in a part of the burden of proof instruction: "*The jury must limit its consideration to the evidence introduced*, and you are not to go outside the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural." According to Ramdass, this emphasized language specifically precluded the jurors from using their common sense in deciding whether the Commonwealth had carried its burden of proof. We do not agree.

The language complained of must be read in the context of the sentence and of the instruction relating to the jury's duty to weigh the evidence. Among other things, that instruction specifically told the jurors that "you are entitled to use your common sense in judging any testimony." Reading the instructions as a whole, we conclude that the language complained of neither expressly nor impliedly precluded the jurors from using their common sense in deciding whether the Commonwealth had proved its cases.

[10] Next, Ramdass argues that the court erred in refusing his proposed finding Instruction A. Ramdass's proposed instruction included first degree murder as a lesser-included offense of the capital murder charge should the Commonwealth fail to prove that the killing was "willful, deliberate and premeditated." We find no merit in this argument.

We do not agree with Ramdass's conclusory statements that his proposed instruction provided a "clearer and more precise connection between the two crimes, which actually allows the jury to weigh the offenses against each other in a more balanced and coherent manner, and a more accurate statement of the law." The court granted separate finding instructions in essentially the same language as Ramdass's proposed instruction. One instruction dealt with capital murder and the other dealt with first degree murder. Since Ramdass's tendered instruction essentially duplicated those instructions, the court did not abuse its discretion in refusing to grant a duplicative instruction. *Eaton v. Commonwealth*, 240 Va. 236, 255, 397 S.E.2d 385, 396 (1990), *cert. denied*, 502 U.S. ——, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991).

Next, Ramdass complains that the court erred in failing to grant his tendered Instruction H that read:

> If a witness makes inconsistent statements at different stages of his testimony in regard to the subject matter under investigation, this does not render his testimony nugatory, and it is the province of the jury to pass upon such inconsistent statements and to give or withhold its assent to the truth of the particular statement.

Instead, the court granted the Commonwealth's Instruction I that read:

> If a witness makes a statement at this trial inconsistent, contradictory, conflicting or materially different from that made on other occasions, it does not render his testimony nugatory, but it is the duty of the jury to determine the truth or falsity of the statements made in this trial and not elsewhere.

We find no abuse of discretion in the trial court's refusal to grant the tendered instruction, which essentially duplicated the language of granted Instruction I.

SENTENCING PHASE

[11] Ramdass argues that the court erred in refusing to respond to the jury's question, "[i]f the defendant is given life, is there possibility of parole at some time before his natural death?" Ramdass maintains that his parole ineligibility should have been disclosed to the jury in answer to this question. Such a response, he contends, would have aided the jury in choosing the appropriate sentence.

We repeatedly have held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence. *Wright*, 245 Va. at 197, 427 S.E.2d at 392. Ramdass advances no persuasive reason, and we perceive none, to modify our previous rulings. Accordingly, we conclude that the court correctly refused to advise the jury about Ramdass's ineligibility for parole. We also conclude that the court, using the language suggested in *Hinton v. Commonwealth*, 219 Va. 492, 495, 247 S.E.2d 704, 706 (1978), as an appropriate response to such a question, correctly told the jury that "you should impose such sentence as you feel is just under the evidence and within the instructions of the court. You are not to concern yourselves with what may happen afterwards."

SENTENCE REVIEW

[12] As required by Code § 17-110.1(C), we review the record to determine whether Ramdass's death sentence (1) was imposed under the influence of passion, prejudice, or any other arbitrary factor, or (2) is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Although Ramdass does not contend that the death sentence was imposed in violation of either of these factors, we have examined the records in all capital murder cases accumulated by this Court pursuant to Code § 17-110.1(E), paying particular attention to those cases in which the underlying felony was robbery and the death penalty was based solely on "future dangerousness."

6. As pertinent, Code § 53.1-151(B1) provides that: "Any person convicted of three separate felony offenses of ... robbery by the presenting of firearms or other deadly weapon ... shall not be eligible for parole."

These cases are compiled in *Yeatts v. Commonwealth*, 242 Va. 121, 143, 410 S.E.2d 254, 267–68 (1991), *cert. denied*, — U.S. —, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

Our review of those records, as well as the records of cases in which life imprisonment was imposed in similar cases, leads us to the conclusion that Ramdass's death sentence was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. The record in this case shows that Ramdass, who was born on October 19, 1971, has been involved in criminal activity since he was 14 years old.

His first violent offense was that of "purse snatch[ing]" from an elderly woman in 1985. During the time Ramdass was on probation for that offense, he began to sell illegal drugs. Soon after, he was involved in the unauthorized use of a moped and in the statutory burglary of a dwelling with the intent to commit larceny. As a result, Ramdass was committed to state juvenile facilities in January of 1986 and was paroled in September of that year. Within three months of that release, Ramdass had violated his parole and was recommitted. He remained in custody until November of 1987, when he was released for a 30-day home visit. Ramdass was classified as an escapee when he failed to return to the state juvenile facility at the end of his home visit.

On February 20, 1988, Ramdass robbed Frederick Thompson. When the police arrested Ramdass for that offense, he was sleeping with a loaded revolver on his bedside table. Ramdass, treated as an adult for that offense, pled guilty and was sentenced to a term of seven years in the penitentiary. Ramdass was released on mandatory parole in May of 1992.

Within three months of that release, while still on parole, Ramdass again acquired a gun. Shortly thereafter, he committed six armed robberies, some accompanied by physical violence to the victims.

The first two robberies occurred on August 25, 1992, when Ramdass abducted Robina Khan, robbed Malik Hasfiz, and robbed and struck Richard Imlow in a Pizza Hut in Fairfax County. Ramdass's third robbery was that of Christopher Allen Crissel, a clerk at Bragg Towers, an apartment-hotel in Alexandria, on August 29. Crissel testified that Ramdass struck Crissel in the jaw "as hard as he could, with a lot of impact [and] said 'Give me the f——— money or I'll blow your head off.'" After Crissel gave Ramdass over $500 from a desk drawer, Ramdass hit the back of Crissel's head with his gun "as hard as he could."

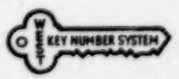
Ramdass committed his fourth and fifth robberies on the same day. On August 30 at about 6:00 p.m., Ramdass robbed Emmanuel Gilbert Selassie and shot him in the head at close range. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Then, on September 2, in the present case, Ramdass robbed Kayani in Ramdass's sixth robbery in eight days; he also shot Kayani in the head at close range and caused his death.

Finally, our review of the record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

CONCLUSION

We find no error in these cases. In addition, we find no basis in the record to commute the death sentence to imprisonment for life. Accordingly, we will affirm the trial court's judgment.

Affirmed.



Ronald Anthony PEGUESE

v.

COMMONWEALTH of Virginia.

Record No. 0934-92-2.

Court of Appeals of Virginia.

Nov. 23, 1993.

Defendant was convicted in the Circuit Court of the City of Richmond, James B.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 17, 1999

No. 98-30
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner - Appellee

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections

Respondent - Appellant

No. 98-32
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellee/cross-appellant filed a petition for rehearing and rehearing en banc and appellant/cross-appellee filed a response in opposition to the petition.

Judge Murnaghan voted to grant panel rehearing. Judges Widener and Niemeyer voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Murnaghan, Ervin, Michael and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler and King voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

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VA R S CT Rule 3A:15
Sup.Ct.Rules, Rule 3A:15

VIRGINIA RULES OF COURT
RULES OF THE SUPREME COURT OF VIRGINIA
PART THREE A. CRIMINAL PRACTICE AND PROCEDURE

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RULE 3A:15. MOTION TO STRIKE OR TO SET ASIDE VERDICT; JUDGMENT OF ACQUITTAL OR NEW TRIAL

(a) Motion to Strike Evidence. After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by the Rule.

(b) Motion to Set Aside Verdict. If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) Judgment of Acquittal or New Trial. The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

Source: Former Rule 3A:22.

Sup. Ct. Rules, Rule 3A:15
VA R S CT Rule 3A:15

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VA ST s 53.1-151
Code 1950, s 53.1-151

TEXT

CODE OF VIRGINIA
TITLE 53.1. PRISONS AND OTHER METHODS OF CORRECTION.
CHAPTER 4. PROBATION AND PAROLE.
ARTICLE 3. PROCEDURES GOVERNING PAROLE.

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Current through End of 1999 Regular Session.

s 53.1-151 Eligibility for parole.

A. Except as herein otherwise provided, every person convicted of a felony and sentenced and committed by a court under the laws of this Commonwealth to the Department of Corrections, whether or not such person is physically received at a Department of Corrections facility, or as provided for in s 19.2-308.1:

1. For the first time, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years;

2. For the second time, shall be eligible for parole after serving one-third of the term of imprisonment imposed, or after serving thirteen years of the term of imprisonment imposed if one-third of the term of imprisonment imposed is more than thirteen years;

3. For the third time, shall be eligible for parole after serving one-half of the term of imprisonment imposed, or after serving fourteen years of the term of imprisonment imposed if one-half of the term of imprisonment imposed is more than fourteen years;

4. For the fourth or subsequent time, shall be eligible for parole after serving three-fourths of the term of imprisonment imposed, or after serving fifteen years of the term of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

For the purposes of subdivisions 2, 3 and 4 of subsection A and for the purposes of subsections B1 and B2, prior commitments shall include commitments to any correctional facility under the laws of any state, the District of Columbia, the United States or its territories for murder, rape, robbery, forcible sodomy, animate or inanimate object sexual penetration, aggravated sexual battery, abduction, kidnapping, burglary, felonious assault or wounding, or manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, if such would be a felony if committed in the Commonwealth. Only prior commitments interrupted by a person's being at liberty, or resulting from the commission of a felony while in a correctional facility of the Commonwealth, of any other state or of the United States, shall be included in determining the number of times such person has been convicted, sentenced and committed for the purposes of subdivisions 2, 3 and 4 of subsection A. "At liberty" as used herein shall include not only freedom without any legal restraints, but shall also include release pending trial, sentencing or appeal, or release on probation or parole or escape. In

the case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment. In any case in which a parolee commits an offense while on parole, only the sentence imposed for such offense and not the sentence or sentences or any part thereof from which he was paroled shall constitute the term of imprisonment.

The Department of Corrections shall make all reasonable efforts to determine prior convictions and commitments of each inmate for the enumerated offenses.

B. Persons sentenced to die shall not be eligible for parole. Any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole.

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole. In the event of a determination by the Department of Corrections that an individual is not eligible for parole under this subsection, the Parole Board may in its discretion, review that determination, and make a determination for parole eligibility pursuant to regulations promulgated by it for that purpose. Any determination of the Parole Board of parole eligibility thereby shall supersede any prior determination of parole ineligibility by the Department of Corrections under this subsection.

B2. Any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in this section between each conviction, shall not be eligible for parole.

C. Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class 1 felony violation or the first degree murder of a child under the age of eight in violation of s 18.2-32, he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to subsection B1 or B2.

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

E. A person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.

E1. Any person who has been convicted of murder in the first degree, rape in violation of s 18.2-61, forcible sodomy, animate or inanimate object sexual penetration or aggravated sexual battery and who has been sentenced to a term of years shall, upon a first commitment to the Department of Corrections, be eligible for parole after serving two-thirds of the term of imprisonment imposed or after serving fourteen years of the term of imprisonment imposed if two-thirds of the term of imprisonment imposed is more than fourteen years. If such person has been previously committed to the Department of Corrections, such person shall be eligible for

parole after serving three-fourths of the term of imprisonment imposed or after serving fifteen years of the terms of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

F. If the sentence of a person convicted of a felony and sentenced to the Department is partially suspended, he shall be eligible for parole based on the portion of such sentence execution which was not suspended.

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in ss 53.1-191, 53.1-197 and 53.1-198.

H. The time for eligibility for parole as specified in subsection D of this section shall apply only to those criminal acts committed on or after July 1, 1976.

I. The provisions of subdivisions 2, 3 and 4 of subsection A shall apply only to persons committed to the Department of Corrections on or after July 1, 1979, but such persons' convictions and commitments shall include all felony convictions and commitments without regard to the date of such convictions and commitments.

CREDIT

(Code 1950, ss 53-251, 53-272; 1954, c. 141; 1956, c. 342; 1958, cc. 249, 468; 1962, c. 327; 1970, c. 648; 1975, c. 244; 1976, cc. 145, 209, 425; 1977, cc. 344, 546, 570; 1979, c. 411; 1981, c. 392; 1982, cc. 270, 636; 1985, c. 555; 1987, c. 668; 1988, c. 872; 1990, cc. 220, 684; 1991, c. 423; 1993, cc. 485, 491, 907.)

Code 1950, s 53.1-151
VA ST s 53.1-151

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SC ST § 16-3-20
Code 1976 § 16-3-20

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

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Current through End of 1998 Reg. Sess.

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty- four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence

secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;
(b) kidnapping;
(c) burglary in any degree;
(d) robbery while armed with a deadly weapon;
(e) larceny with use of a deadly weapon;
(f) killing by poison;
(g) drug trafficking as defined in Section 44-53-370(e), 44-53- 375(B), 44-53-440, or 44-53-445;
(h) physical torture; or
(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986; 1990 Act No. 604, § 15, eff June 25, 1990; 1992 Act No. 488, § 1, eff July 1, 1992; 1995 Act No. 83, § 10, eff January 1, 1996; 1996 Act No. 317, § 1, eff May 20, 1996.

EDITOR'S NOTE--

1990 Act No. 604, § 17, eff June 25, 1990, provides as follows:

"This act takes effect upon approval by the Governor. A person arrested, charged, or indicted under those provisions of law amended by this act must be tried and sentenced and any administrative penalty or suspension exacted as provided by the law in force at the time of the commission of the crime."

EFFECT OF AMENDMENT--

The **1985** amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The **1986** amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised subsection (C) by rewriting subitem (a)(7), by adding subitems (a)(8) and (9), and by adding the provisions relative to juries which do not recommend death despite finding an aggravating circumstance beyond a reasonable doubt, questioning the jury, prior to its dismissal, as to whether it found an aggravating circumstance beyond a reasonable doubt, and designation of such a finding in a writing signed by all members of the jury; and revised subsection (E) by substituting "verdict according to law" for "verdict of guilty according to law".

The **1990** amendment revised subsection (C)(a).

The **1992** amendment, in subsection (C), item (b), added subitem (10).

The **1995** amendment substantially revised this section.

The **1996** amendment in subsection (C), item (a), added subitem (11).

Code 1976 § 16-3-20

SC ST § 16-3-20

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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY LEE RAMDASS

Petitioner,

v.

RONALD J. ANGELONE,
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit
and on Application for a Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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MARK L. EARLEY
Attorney General of Virginia
KATHERINE P. BALDWIN
Assistant Attorney General
Counsel of Record
Office of the Attorney General
900 East Main Street
Richmond, Virginia 2321
(804) 786-4624

49PP

QUESTIONS PRESENTED

1. In a case where it is undisputed that the petitioner would have been ***eligible*** for parole on a life sentence as a matter of state law at the time the jury sentenced him to death, and where the petitioner does not contest the fact that Simmons v. South Carolina does not apply unless the prisoner was ***ineligible*** for parole, should certiorari be granted to decide whether the Fourth Circuit erred in ruling that it was not free to second-guess the Virginia Supreme Court's determination of a matter of state law?

2. In a case where it is undisputed that the trial court appointed an independent mental health expert to assist the petitioner during the penalty phase of trial and where it is equally undisputed that, as a matter of Virginia statutory law, ***every*** capital murder defendant has an absolute right to such appointment ***regardless of whether the prosecutor intends to prove future dangerousness or to present expert evidence on that issue***, should certiorari be granted to resolve a so-called conflict in the federal courts concerning the application of Ake v. Oklahoma to a situation that did not occur in Ramdass' case and cannot occur in Virginia?

3. Should this Court grant the application for a stay of execution simply to "hold" Ramdass' case for the decision in Terry Williams v. Taylor regarding the Fourth Circuit's interpretation of 28 U.S.C. § 2254 (d) even though, by Ramdass' own admission, the Fourth Circuit's application of § 2254 (d) to the Simmons and Ake claims was merely an alternative ruling?

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STATEMENT OF THE CASE

On January 28, 1993, a jury in the Circuit Court of Fairfax County, Virginia, found Ramdass guilty of the capital murder of Mohammed Kayani during the commission of robbery and of the illegal use of a firearm. Ramdass pleaded guilty to a charge of robbery. After a separate sentencing proceeding, the jury found that Ramdass represented a continuing serious threat to society and sentenced him to death for the capital murder. See Va. Code § 19.2-264.4. The jury also sentenced him to four years in prison for the firearm offense. After conducting the sentencing hearing required by § 19.2-264.5 on April 6, 1993, the court imposed the jury's sentences and also sentenced Ramdass to life in prison for the robbery.

The convictions and sentences unanimously were affirmed by the Virginia Supreme Court on November 5, 1993. Ramdass v. Commonwealth, 437 S.E.2d 566 (Va. 1993). This Court subsequently granted certiorari and remanded the case for reconsideration in light of its intervening decision in Simmons v. South Carolina, 512 U.S. 154 (1994). Ramdass v. Virginia, 512 U.S. 1217 (1994). On remand, the Virginia Supreme Court reaffirmed the trial court's judgment. Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994). (JA 202).[1] This Court denied certiorari review of the reaffirmance on April 24, 1995. Ramdass v. Virginia, 514 U.S. 1085 (1995).

On May 11, 1995, the trial court appointed counsel to represent Ramdass in a state habeas corpus proceeding. (JA 217). Pursuant to Ramdass' request, a second lawyer was appointed and Ramdass filed a petition for a writ of habeas corpus in the Virginia Supreme Court on August 30, 1995. On March 18, 1996, the Virginia Supreme Court dismissed the petition. (JA 283). Ramdass' petition for rehearing was denied on June 7, 1996. (JA 303).

On June 28, 1996, the trial court scheduled Ramdass' execution for August 21, 1996. (JA 304). On August 15, 1996, the United States District Court for the Eastern District of Virginia in Norfolk stayed Ramdass' execution. (JA 306). On September 11, 1996, the district court appointed three new lawyers to represent Ramdass. (JA 308).

Ramdass filed a § 2254 petition on February 14, 1997. On February 27, 1998, a Magistrate Judge issued a report and recommendation that all but one of Ramdass' claims be dismissed. (JA 700). The Magistrate Judge recommended that Ramdass' death sentence be vacated on the basis of an alleged Simmons error. (JA 804). On August 14, 1998, the district court granted relief on the Simmons claim and "remanded" the case to the state trial court for resentencing. (JA 869). Ramdass v. Angelone, 28 F. Supp.2d 343 (E.D. Va. 1998).

The respondent appealed to the United States Court of Appeals for the Fourth Circuit. On August 3, 1999, a three-judge panel of the Fourth Circuit reversed the district court. Ramdass v. Angelone, 187 F.2d 396 (4th Cir. 1999). One member of the panel, Judge Murnaghan, dissented.

On September 17, 1999, Ramdass' petition for rehearing and rehearing *in banc* was denied.[2] Judge Murnaghan voted to grant panel rehearing. A "member" of the Court requested a poll on the petition for rehearing *in banc*. Judge Murnaghan and three other judges[3] voted to hear the case *in banc*. Nine judges voted to deny rehearing. On September 28, 1999, the Fourth Circuit denied Ramdass' motion to stay the mandate and the mandate issued on October 6, 1999.

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[1] References to the appendix filed below will be indicated by "(JA ___)." A copy of the appendix has been lodged with this Court.

[2] Copies of the rehearing papers have been lodged with this Court.

[3] The three other judges were Judge Ervin (now deceased), Judge Michael and Judge Motz.

On October 22, 1999, the Circuit Court of Fairfax set Ramdass' execution for November 23, 1999, pursuant to Virginia Code § 53.1-232.1. On November 5, 1999, the Fourth Circuit denied Ramdass' motion to recall its mandate and to stay the execution.

STATEMENT OF THE FACTS

I. *The Crimes*

It is undisputed that Ramdass is the person who murdered Mohammed Kayani by shooting him in the head at point-blank range. The Virginia Supreme Court found the facts surrounding Ramdass' capital offense to be as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7-Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7-Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7-Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f---------- head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.
>
> When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?" After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."
>
> Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass, 437 S.E.2d at 568-569. See 28 U.S.C. § 2254(e)(1) (state court findings of fact must be presumed correct and presumption may be overcome only by clear and convincing evidence); Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's rendition of historical facts).

With respect to the overwhelming evidence warranting the death penalty, the Virginia Supreme Court found as follows:

> The record in this case shows that Ramdass, who was born October 19, 1971, has been involved in criminal activity since he was 14 years old.
>
> His first violent offense was that of "purse snatch[ing]" from an elderly woman in 1985. During the time Ramdass was on probation for that offense, he began to sell illegal drugs. Soon after, he was involved in the unauthorized use of a moped and in the statutory burglary of a dwelling with the intent to commit larceny. As a result, Ramdass was committed to state juvenile facilities in January of 1986 and was paroled in September of that year. Within three

months of that release, Ramdass had violated his parole and was recommitted. He remained in custody until November of 1987, when he was released for a 30-day home visit. Ramdass was classified as an escapee when he failed to return to the state juvenile facility at the end of his home visit.

On February 20, 1988, Ramdass robbed Frederick Thompson. When the police arrested Ramdass for that offense, he was sleeping with a loaded revolver on his bedside table. Ramdass, treated as an adult for that offense, pled guilty and was sentenced to a term of seven years in the penitentiary. Ramdass was released on mandatory parole in May of 1992.

Within three months of that release, while still on parole, Ramdass again acquired a gun. Shortly thereafter, he committed six armed robberies, some accompanied by physical violence to the victims.

The first two robberies occurred on August 25, 1992, when Ramdass abducted Robina Khan, robbed Mark Hasfiz, and robbed and struck Richard Imlow in a Pizza Hut in Fairfax County. Ramdass's third robbery was that of Christopher Allen Crissel, a clerk at Bragg Towers, an apartment-hotel in Alexandria, on August 29. Crissel testified that Ramdass struck Crissel in the jaw "as hard as he could, with a lot of impact [and] said 'Give me the f_____ money or I'll blow your head off.'" After Crissel gave Ramdass over $500 from a desk drawer, Ramdass hit the back of Crissel's head with his gun "as hard as he could."

> Ramdass committed his fourth and fifth robberies on the same day. On August 30 at about 6:00 p.m., Ramdass robbed Emmanuel Gilbert Selassie and shot him in the head at close range. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Then, on September 2, in the present case, Ramdass robbed Kayani in Ramdass's sixth robbery in eight days; he also shot Kayani in the head at close range and caused his death.
>
> Finally, our review of the record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Ramdass, 437 S.E.2d at 574.

II. *The Simmons Claim*

The Fourth Circuit recounted the relevant facts as follows:

> At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society" -- the "future dangerousness" predicate for imposition of the death penalty. *See* Va. Code Ann. 19.2-264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."
>
> During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern themselves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three strikes provision. n1 *See* Va. Code Ann. 53.1-151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

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n1 Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is ineligible for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va. Code Ann. 53.1-151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18-year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks after the jury in this case concluded its sentencing deliberations.

Ramdass, 187 F.3d at 400.

On appeal to the Virginia Supreme Court, Ramdass claimed, among other things, that error had occurred when the trial court gave the model jury instruction regarding parole eligibility. (JA 167). The Virginia Supreme Court affirmed Ramdass' sentence on November 5, 1993. On the parole eligibility issue, the Court ruled that, under long-standing precedent, the trial court correctly had answered the jury's question regarding parole eligibility. Ramdass, 437 S.E.2d at 573.

Simmons v. South Carolina was not argued in this Court until January 18, 1994. Simmons, 512 U.S. at 154. Ramdass filed his certiorari petition in this Court in February, 1994, arguing, among other things, that the trial court had erred in its response to the jury's question regarding parole. This Court decided Simmons on June 17, 1994. On June 20, 1994, the Court granted Ramdass' certiorari petition and remanded the case to the Virginia Supreme Court for reconsideration in light of Simmons. Ramdass v. Virginia, 512 U.S. 1217 (1994).

On remand in the Virginia Supreme Court, Ramdass argued that Simmons required vacatur of his sentence. He alleged in conclusory fashion that he was ineligible for parole. (JA 184-185). The Commonwealth argued in response that, at the time the jury was considering what sentence to recommend, Ramdass could not have been rendered parole-ineligible by a life sentence on the capital crime because he had at that time only one of the three necessary qualifying convictions under Virginia Code § 53.1-151(B1).[4] (JA 193-195).

Ramdass made no reply to the Commonwealth's argument, even though the Virginia Supreme Court's briefing order expressly permitted him to do so. (JA 182). In its opinion reaffirming Ramdass' sentence, the Virginia Supreme Court held as follows:

> In Simmons, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. Simmons, 512 U.S. at ___, 114 S.Ct.

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[4] As the Fourth Circuit observed, § 53.1-151(B1) required that, before a convicted felon could be classified as parole-ineligible, he must have been convicted of three offenses of murder, rape or robbery with a deadly weapon, and further that the three or more offenses must not have occurred as part of a common act, transaction or scheme. At the time the capital jury was considering his sentence, Ramdass had been convicted of three robberies, but one involved no deadly weapon and the other two occurred during the same restaurant robbery and, thus, clearly were part of a common act, transaction or scheme. Ramdass also had been tried and found guilty of the Domino's Pizza robbery in Alexandria, but the trial court in that case did not enter judgment on the jury's verdict until after Ramdass' capital jury had sentenced him. Thus, under Virginia law, that guilty verdict could not have been counted as a qualifying "conviction" under § 53.1-151 at the time Ramdass' capital jury inquired about his potential parole status.

at 2198. Hence, Simmons applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1-151(B) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass' penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B)(1). They were:

(1) Ramdass' January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B)(1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B)(1).

> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B)(1). See Smith v. Commonwealth, 134 Va. 589, 592-593, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered no conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the Simmons decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

(JA 202-204).

Ramdass did not petition the Virginia Supreme Court for rehearing. He petitioned this Court for certiorari review, however, and argued for the first time that the Virginia Supreme Court improperly had found him eligible for parole under state law. (JA 207). This Court denied certiorari on April 24, 1995. Ramdass v. Virginia, 514 U.S. 1085 (1995).

Ramdass repeated his generalized direct appeal Simmons claim during his state habeas corpus proceeding. He did not challenge the Virginia Supreme Court's finding of parole eligibility. (JA 251-253). The Virginia Supreme Court refused to relitigate the matter under its rule in Hawks v. Cox, 175 S.E.2d 271 (Va. 1970). (JA 283, allegation C(13)). When Ramdass filed his § 2254 petition in the federal district court, however, he greatly expanded and changed the Simmons complaint that had been presented to the Virginia Supreme Court. He argued that: (1) under state law he allegedly was ineligible for parole; (2) the Virginia Supreme Court had no authority to determine parole eligibility; (3) the Virginia Supreme Court's decision was internally inconsistent; (4) the Virginia Supreme Court ignored a decision of the Virginia Court of Appeals; (5) the Virginia Supreme Court's decision was at odds with the parole statute; (6) even if the finding of eligibility was correct, the Simmons instruction still should have been given; (7) the refusal to give the instruction violated the Eighth Amendment; (8) he was entitled to the instruction as a matter of mitigating evidence; (9) the trial judge ignored Ramdass' parole ineligibility in imposing the death sentence; and (10) the Virginia Supreme Court was required under Virginia Code § 17-110.1 to consider his parole ineligibility. (JA 315-344).

Despite the respondent's assertion that the bulk of Ramdass' Simmons complaint was barred from review in federal court because it never had been presented to the Virginia Supreme Court (JA 514-515), the Magistrate Judge ruled that it had been preserved in its entirety. (JA 732-733, 795-796). The Magistrate Judge then gratuitously ruled that Simmons was not a "new

rule" (JA 793, 797-804),[5] and went on to hold that: the Virginia Supreme Court's eligibility finding was "puzzling" (JA 805); the Virginia Supreme Court had misinterpreted Virginia law (JA 807-810); and, in any event, Simmons was not limited to "the very narrow issue of specific parole eligibility or lack thereof." (JA 811). The Magistrate Judge thus found the Virginia Supreme Court's decision unreasonable under § 2254(d) and recommended vacatur of sentence. (JA 812).

The District Judge found that two of Ramdass' Simmons arguments never had been presented to the Virginia Supreme Court and, therefore, were barred from review: the contention that the Virginia Supreme Court had no authority to determine parole eligibility and the contention that the Virginia Supreme Court's parole finding was arbitrary. (JA 835). The District Judge, however, agreed with the Magistrate Judge's other conclusions: that Simmons was but one of "a series of cases incrementally refining the process of applying the death penalty" and that its "theme" was encompassed in prior cases from this Court requiring the admission of ***mitigating evidence*** under the Eighth Amendment as well as those dealing with the Fourteenth Amendment's due process right to present rebuttal evidence[6] (JA 850); that the Virginia Supreme Court's decision "limited the application of Simmons...in a manner inconsistent with the language in Simmons, required an inconsistent treatment of two separate convictions of Petitioner, and ***contradicted more than one hundred years of Virginia law*** that

[5] In 1997, ***a year before*** the Magistrate Judge ruled in Ramdass' case, this Court had held that the rule in Simmons v. South Carolina was "new" and therefore inapplicable on federal collateral review to cases which were final before Simmons was decided. O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969 (1997). Ramdass' case obviously was not final before Simmons was decided and the respondent never has argued that the Simmons claim ***raised on direct appeal*** was barred by the new rule doctrine.

[6] In Simmons, this Court ***expressly*** left open the question of whether the rule it had announced was required by the Eighth Amendment. 512 U.S. at 162 n.4.

says a conviction occurs when the jury renders the verdict" (JA 849, emphasis added); and, finally, that the Virginia Supreme Court unreasonably had applied Simmons "[e]ven assuming the definition of 'conviction' was properly determined by the Virginia Supreme Court," because "the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole." (JA 858). In the opinion of the district court, the "jury could have been informed, with all confidence, that Petitioner would never be released from prison...." (Id.). The district court "remanded" Ramdass' case to the Circuit Court of Fairfax County for re-sentencing. (JA 869).

On appeal, the Fourth Circuit held that the district court had erred. It held first that Simmons requires a determination of whether the defendant is eligible for parole and that that determination is a matter of state law, rather than a federal issue defined, as Ramdass asserted, by a "nonlegalistic 'commonsense impossibility of parole.'" Ramdass, 187 F.3d at 405. Second, the Court held that Ramdass' nebulous standard for determining parole was contrary to Fourth Circuit precedent. Id. at 406. Third, it held that, as a matter of logic, ***any*** determination of a state prisoner's parole eligibility status has no meaning beyond what state law determines. Id. Fourth, the Court held that Ramdass' proposed "standard" was not "clearly established" under § 2254 (d)(1), and also ran afoul of the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989), because it asked for an extension of what Simmons requires. Id. Finally, the Fourth Circuit held that Ramdass' "insinuation" that the Virginia Supreme Court had "acted craftily in denying his Simmons claim" was completely unfounded: the Virginia rule that a conviction does not count for parole eligibility purposes until a final sentencing order has been entered comports with the "age-old rationale" that, before negative consequences (such as parole ineligibility) may be imposed based upon a conviction, a defendant is accorded added protection by a definition of

"conviction" that limits it to orders which actually have been entered. In Ramdass' case, the Fourth Circuit accurately observed that the random order in which his trials and sentencing proceedings had taken place was entirely foreseeable, given the fact that he had committed so many felonies in such a short period of time. Id. at 407.

In his petition for rehearing to the Fourth Circuit, Ramdass for the first time expressly abandoned his primary contention throughout the federal proceedings: that the Virginia Supreme Court's determination of his parole eligibility at the time of sentencing was wrong as a matter of state law. (Pet. Rehrg. at 3, n.2). Instead, he argued that Simmons should be ***extended*** to his case because it supposedly was "close" to Simmons, an implicit admission that it was not "controlled" by Simmons. (Pet. Rehrg. at 5). The Fourth Circuit, however, rejected his invitation to create a new rule, and denied the petition for rehearing.

III. *The Ake Claim*

Before trial, the Fairfax Circuit Court appointed Dr. Samenow, an expert in forensic psychology, to assist Ramdass with sentencing issues pursuant to Virginia Code § 19.2-264.3:1. The trial judge appointed Dr. Samenow because he "calls it like it is, whether it is in favor of the Commonwealth or the defendant or either one." (JA 28). The prosecutor noted on the record that Dr. Samenow had testified for other defendants. (JA 28-29).[7] During the sentencing phase of trial, neither the prosecution nor the defense presented any expert witnesses.

Ramdass made no complaint about the appointment of Dr. Samenow at trial or on direct

[7] Another Virginia death-row inmate since executed, Dwayne Wright, expressly had asked for Dr. Samenow at trial because he was so highly qualified. (JA 527). Dr. Samenow testified on behalf of Wright at trial and presented extensive information that was favorable to that defendant. (JA 550-616). Dr. Samenow also was appointed and testified for Calvin Swann, another Virginia death-row inmate. See Swann v. Taylor, 119 S.Ct. 1591 (1999) (cert. denied) (BIO 96-8686 at p. 17-19).

appeal. In his state habeas petition, Ramdass claimed that his trial counsel had been ineffective for allegedly failing to object to the appointment of Dr. Samenow. (JA 229). The Virginia Supreme Court denied the claim of ineffective assistance for lack of merit.

In his federal habeas petition, Ramdass claimed that the appointment of Dr. Samenow violated Ake v. Oklahoma, 470 U.S. 68 (1985). (JA 345-356). The district court found the claim procedurally barred because it had not been presented in state court. (JA 836-837). Ramdass also claimed that trial counsel had performed ineffectively because they did not object to the so-called "pro-prosecution" stance of Dr. Samenow. The district court assumed for the sake of argument that counsel performed deficiently under Strickland v. Washington, 466 U.S. 668 (1984), but denied the claim because the petitioner could not show the requisite prejudice. Ramdass, 28 F. Supp. 2d at 370.

On appeal in the Fourth Circuit, Ramdass quoted from Dr. Samenow's report in his opening brief and filed a motion to supplement the record to include the report because, as he admitted, the report never had been presented to the district court or made a part of the record below. (Respondent's Appendix 1).[8] The Fourth Circuit denied Ramdass' motion to supplement the record. (Respondent's Appendix 7).

With respect to the claim of Ake error, the Fourth Circuit held that "[e]ven though the claim appeared [in the state habeas petition] ***under the heading of ineffective assistance of counsel*** and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on [Ake]" and thus had preserved the substantive claim of Ake error for federal court review. Ramdass, 187 F.3d at 409 (emphasis added). The Fourth Circuit rejected the claim of error, however, as follows:

[8] Needless to say, the report also never has been presented to any state court.

> Ake provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. See Ake, 470 U.S. at 82-83 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when the State presents psychiatric evidence of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

Ramdass, 187 F.3d at 409.

The Fourth Circuit further rejected the related claim of ineffective assistance as follows:

> Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither Ake, 470 U.S. at 83, nor Virginia Code § 19.2-264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by Strickland, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

Id. at 410.

In his petition for a writ of certiorari, Ramdass quotes from, and relies upon, the report prepared at the time of trial by Dr. Samenow. (Pet. at 10). Ramdass also has lodged a copy of the report with this Court along with a cover letter informing the Court of the lodging. (Respondent's Appendix 9). ***In neither his petition for a writ of certiorari nor in his letter covering his lodging of the report does Ramdass make any mention, or inform the Court in any manner, of the ruling by the Fourth Circuit that Dr. Samenow's report - which never was presented to any state court or any lower federal court – is not part of the record in this case.***

REASONS WHY THE WRIT AND APPLICATION FOR A STAY OF EXECUTION SHOULD BE DENIED

I. *The Fourth Circuit Properly Determined that Ramdass Is Asking For An Extension Of Existing Law And Therefore That The Requested Relief Is Not Available On Collateral Review.*

Ramdass opens his argument with the remarkably incorrect contention that "[t]here has never been disagreement as to the practical reality of Ramdass' situation: If he was sentenced to life imprisonment, he was never going to have the opportunity to be considered for release on parole. No state or federal court judge has questioned that immutable fact." (Pet. Cert. at 17). However, as the opinions of the Virginia Supreme Court and Fourth Circuit clearly show, exactly the opposite to Ramdass' contention is true: it has been determined conclusively as a matter of state law that a sentence of life imprisonment in the capital murder case would ***not*** have rendered him ineligible for parole.[9]

Indeed, recognizing that relief under Simmons otherwise was not available to him, Ramdass asserted throughout the years of post-conviction litigation that he was in fact ***ineligible*** for parole at the time the jury was considering his sentence. He made this assertion the centerpiece of his Simmons challenge in the Virginia Supreme Court on remand from this Court on direct appeal, in this Court on certiorari review of that remand decision, in the Virginia Supreme Court on habeas review, in the district court on federal habeas review and in the Fourth

[9] Even more puzzling is Ramdass' completely incorrect statement that "even the Fourth Circuit acknowledged [that] everyone except the jury knew that the only alternative sentence to death was life without the possibility of parole." (Pet. Cert. at 26). Ramdass cites to no part of the Fourth Circuit's decision for this assertion as, indeed, no such statement was made by the Court of Appeals. The Fourth Circuit steadfastly held that Ramdass was eligible for parole at the time of his capital sentencing because the Virginia Supreme Court had so determined as a matter of state law.

Circuit on appeal. He also argued specifically in the federal courts that the Virginia Supreme Court had erred in its determination that, under Virginia law, he was not ineligible for parole.[10]

Then, ***for the first time in the case***, in his petition for rehearing in the Fourth Circuit, Ramdass ***expressly abandoned*** his challenge to the Virginia Supreme Court's eligibility determination. (Pet. Rehrg. at 3, n.2). Instead, Ramdass argued, as he now does, that, despite his uncontested status as a ***parole-eligible*** defendant at the time his jury was deciding sentence, he nevertheless was entitled to a no-parole instruction under his novel "functional reality of parole ineligibility" test. (Pet. Cert. at 17).[11] According to Ramdass, although he was "technically" eligible for parole, he was "functionally" ineligible and, therefore, entitled to a Simmons no-parole instruction. Just exactly what "functionally ineligible for parole" means, however, is anything but clear under Ramdass' theory, except, of course, to say that ***he*** qualified under that amorphous test.

Ramdass' current claim must be regarded as a request that this Court ***extend*** the holding in Simmons to cover the unique facts of his case alone: he was parole-eligible at the time of his capital sentencing, but, because it turned out that his ***subsequent*** convictions ***subsequently*** rendered him parole-ineligible, Simmons should be interpreted to apply to him. Certainly no precedent compelled a ruling in his favor at the time Ramdass' case became final, or even today. His claim thus is nothing less than a request for the creation of a new rule on collateral review

[10] Ramdass never contested this eligibility determination in state court. See Ramdass, 187 F.3d at 402.

[11] In the Court of Appeals, Ramdass asserted that parole eligibility must be determined based "on a nonlegalistic 'commonsense impossibility of parole.'" Ramdass, 187 F.3d at 405.

that is prohibited, as the Fourth Circuit properly found, by both the new rule doctrine and 28 U.S.C. § 2254 (d)(1).[12] Ramdass, 187 F.3d at 406.

Indeed, the argument Ramdass has constructed only demonstrates the novelty of his theory. Ramdass does not argue that Simmons or any cases interpreting Simmons compel a decision in his favor. Rather, he asks this Court to "grant certiorari to decide ***whether*** [the issue here] ***should be*** analyzed using a technical or a functional mode of analysis." (Pet. Cert. at 17, emphasis added). Clearly, whether a new formula for analysis ***should*** be employed is a question appropriately considered only in the context of direct review. It is expressly prohibited in the context of a case like Ramdass' that is on collateral review. See Gray v. Netherland, 518 U.S. 152, 166-169 (1996) ("habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'") (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

Ramdass asks this Court to employ a mode of analysis for parole-eligibility determinations completely divorced from state law on the matter. He says the Court should use the type of "reasonable person" test employed in determining whether a suspect is in custody under Miranda v. Arizona, 384 U.S. 436 (1966), or that used by federal courts deciding whether a prisoner is in custody under 28 U.S.C. § 2254, or the formula used to determine whether a defendant is entitled to the appointment of counsel, or the mode of analysis used by federal courts when deciding whether a state law violates a provision of the Constitution.

[12] 28 U.S.C. § 2254(d)(1) prohibits the granting of habeas relief on a claim rejected on its merits by the state court unless the state court adjudication was contrary to, or an unreasonable application of, "clearly established" federal law as determined by this Court.

The problem with these suggested tests – apart from their "new rule" implications – is that none of the circumstances has anything to do with the issue in Simmons. In Simmons, the information the defendant is entitled to impart to the jury is ***what his precise parole-eligibility status will be under state law if given a life sentence***. In the Miranda, federal habeas custody or right to counsel contexts, the determinations are not dependent in any manner on state law.

In Miranda, the rules are formulated to guide police officers with no legal background. In the federal habeas custody context, the rules guide federal judges by delineating the parameters of their jurisdiction. And, in the context of the right to counsel, the rules are formulated to guide the state courts in identifying the circumstances calling for the assistance of counsel. None of these examples of "functional reality" governs what instructions must be given to a jury, much less when a prisoner becomes ineligible for parole under state law.

Moreover, there is no issue in Ramdass' case, and Ramdass makes no argument, that Virginia's parole-eligibility statute or determination is unconstitutional. Thus, the tax, and other similar, cases he relies upon as examples of how a federal court assesses the "constitutional consequences" of a state statute simply have no connection to the question in Ramdass' case of whether a State's unchallenged and undeniably constitutional determination of parole-eligibility status may be redetermined by a federal court on collateral review.

Ramdass also argues that this Court used a "functional" test in Simmons because, according to Ramdass, Simmons was not really ineligible for parole. Ramdass goes to great lengths to prove that South Carolina supposedly contended that Simmons was eligible for parole, but his argument squarely is refuted by the opinion itself. In Simmons, not only had ***state officials testified*** that Simmons was in fact ***ineligible*** for parole under state law, but the ***State of South Carolina conceded this point at trial and never argued in this Court that he was eligible***

for parole. See Simmons, 512 U.S. at 158 (plurality opinion). Thus, the decisive distinguishing factor between Ramdass and Simmons is that here there is a ruling from the Virginia Supreme Court that, under Virginia law, Ramdass was ***eligible*** for parole at the time of his capital sentencing.

In his attempt to find similarity between his case and Simmons, Ramdass further contends that Virginia's position is like South Carolina's argument that a no-parole instruction should not have been given because Simmons may have been eligible for different forms of early release. But that is not what South Carolina argued in Simmons. To the contrary, it argued that, "***notwithstanding [Simmons'] parole ineligibility***, [Simmons] might receive holiday furloughs or ***other*** forms of early release" and thus the jury should not be misled to believe Simmons could not be released despite his parole-ineligibility status. Id. at 158 (emphasis added). This Court rejected South Carolina's reasoning because, unlike the other forms of ***possible*** release, Simmons' present parole-ineligibility was a ***certainty*** as a matter of state law, known at the time of sentencing, conceded by the State and thus a "legally accurate" factor the jury was entitled to consider when evaluating his future dangerousness. Id. at 166.

Virginia's position always has been simply that Ramdass' case does not fall within the ambit of Simmons because an ineligibility instruction in his case would not have been "legally accurate," a fact even Ramdass must concede unless the undefined, nebulous "functional reality" view of ineligibility prevails. While Simmons had been determined parole-ineligible under South Carolina law, Ramdass has been determined to have been parole-eligible under Virginia law at the time of his capital sentencing proceeding. The difference is dispositive.

Ramdass' complaint is one that ***any*** death-row inmate may make: odds are that he never would be released into society if given a life sentence, so he should have been able to instruct the

jury on those odds. Simmons, of course, imposes no such requirement and courts uniformly have rejected any extension of Simmons to similar situations. See, e.g., Roach v. Angelone, 176 F.3d 210, 220 (4th Cir.) (Simmons does not apply to defendant who would be eligible for parole after serving twenty-five years), cert. denied, 120 S.Ct. ___ (1999); Hughes v. Johnson, ___ F.3d ___, 1999 U.S. App. LEXIS 24842 at *22 (5th Cir. 1999) (same); Ingram v. Zant, 26 F.3d 1047, 1054 (11th Cir. 1994) (same); Burgess v. Georgia, 450 S.E.2d 680, 693 (Ga. 1994) (same).

Indeed, just to state the hypothetical instruction that would have had to have been given in Ramdass' case in order to convey accurate information to the jury – and Ramdass does not even attempt to articulate the instruction he believes he was entitled to - is to demonstrate how far removed Ramdass' case is from Simmons. If his claim had any merit, Ramdass' jury would have had to have been instructed as follows:

> You are instructed that the conviction in this case will count as the second out of three convictions necessary to make the defendant ineligible for parole under state law and that, therefore, a life sentence in this case will not render the defendant ineligible for parole.
>
> In a separate case, however, the defendant has been tried and found guilty of another offense upon which a judgment of conviction has not yet been entered. Under Virginia law, the court in that case may decide to set aside that guilty verdict or retry the case.
>
> If the court in that case decides to set aside or retry, the jury's verdict in that case would not render the defendant ineligible for parole if you elect to fix punishment at life. However, if the court in that case decides to enter a judgment of conviction upon the jury's verdict, it would count as a third conviction making the defendant ineligible for parole if you elect to fix punishment at life.
>
> It is unknown when the court in that other case will make its decision.

Certainly, Simmons does not require such an instruction. The plurality opinion plainly stated that "where ... ***state law*** prohibits the defendant's release on parole, due process requires that the

sentencing jury be informed that the defendant is parole ineligible." Simmons, 512 U.S. at 156 (emphasis added). Justice O'Connor's concurring opinion plainly stated that a no-parole instruction was required "in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole ...." Id. at 177. Thus, under Simmons, Ramdass simply was not entitled to a no-parole instruction because a life sentence would not have rendered him ineligible for parole.

Ramdass, moreover, is wrong when he argues that, under Virginia Supreme Court Rule 3A:15, the Alexandria Circuit Court had no choice but to enter judgment on the Domino's Pizza robbery verdict and that that conviction therefore was a certainty. (Pet. Cert. at 8, n.4). First, his argument is foreclosed by the Rule itself which vests a Virginia trial court with absolute authority either to enter a judgment of acquittal or to grant a new trial up to twenty-one days after a final order has been entered. (Pet. App. at 67). Indeed, Ramdass admits this undeniable fact. (Pet. Cert. at 8, n.4).

Ramdass states, however, that the fact that the Rule also could have resulted in a setting aside of the judgment in the capital murder case and yet the Virginia Supreme Court still counted that judgment as a "conviction" under § 53.1-151, the parole statute, somehow shows that the Virginia Supreme Court rejected a "hypothetical possibility of release" under the Rule. (Id.). This convoluted logic is completely unfounded: the question decided by the Virginia Supreme Court was not whether a trial, or any, court has the authority to set aside a guilty verdict before entry of final judgment but only whether a final judgment had in fact been entered so as to trigger the parole statute at all. The Dominos Pizza guilty verdict had not been imposed by the trial court and thus, under Virginia law, could not count as a "conviction."

Second, Ramdass' "Rule 3A:15" argument is nothing more than an attempt to second guess the Virginia Supreme Court on a matter of pure state law. The federal courts, however, are not free to redecide matters of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Engle v. Isaac, 456 U.S. 107, 119 (1982).

What Ramdass is left with is an argument that, although the Virginia Supreme Court was fully authorized to interpret its own parole statute and to find that Ramdass was not ineligible for parole at the time his capital jury was considering sentence, this Court should grant certiorari to decide whether the federal court may find that he was ineligible for parole under a "functional reality" test that is not tied to any state law defining when a person becomes ineligible for parole.[13] Ramdass seeks relief for himself alone through a reinterpretation of Simmons and of federal law governing collateral review that has no support in either this, or any lower, Court's cases. His claim, therefore, presents no "compelling" reason to grant certiorari because the Fourth Circuit's decision is simply a straightforward application of this Court's precedents which will have no impact beyond the parameters of Ramdass' case. See U.S. Sup. Ct. R. 10.

II. *The Fourth Circuit's Rejection Of Ramdass' "Ineffective Psychologist" Claim Does Not Conflict With Ake v. Oklahoma Or With Other Circuits.*

It is undisputed that the trial court appointed an independent mental health expert to assist Ramdass with sentencing issues, that the trial court considered Dr. Samenow eminently qualified and that Dr. Samenow had testified on behalf of other capital defendants, including at least one

[13] The Fourth Circuit certainly was correct when it recognized that, "as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law." Ramdass, 187 F.3d at 406.

who requested his appointment. It also is undisputed that Ramdass made no complaint about Dr. Samenow's appointment until his state habeas lawyers faulted his trial lawyers for not objecting to Dr. Samenow, that Ramdass made no separate claim under Ake v. Oklahoma about Dr. Samenow until he filed his federal habeas petition and that the Fourth Circuit denied Ramdass' motion to supplement the record with Dr. Samenow's report because Ramdass had not offered the report to any state or lower federal court for review.

Ramdass now argues that certiorari should be granted in order to resolve a conflict between the circuits about what showing a defendant must make before a State is required to appoint an independent mental health expert. It is important to understand, however, that Ramdass does not claim that the trial court denied his motion for the appointment of an expert or that the expert appointed was not independent. Rather, Ramdass claims that, because his expert did not give him a favorable report for mitigation purposes, he was entitled to a different expert who would testify favorably. Certiorari should not be granted because Ramdass' claim was not properly preserved below, because it is barred by the "new rule" doctrine, because any conflict among the circuits over what Ake requires before an expert must be appointed is irrelevant to the Fourth Circuit's decision and because Ramdass' claim is not even governed by Ake at all.

A. The claim was not properly preserved.

It is elemental that a habeas petitioner must have presented his claim to the state court before a federal court may consider it on collateral review. See Gray, 518 U.S. at 163. Indeed, a habeas petitioner does not meet this requirement simply by making the claim in state court under one constitutional theory and then raising the same claim in federal court under a different constitutional theory. See Duncan v. Henry, 513 U.S. 364 (1995). Ramdass did not make his Ake claim until he filed in federal court. As the Fourth Circuit found, in the state habeas

petition, "the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert." Ramdass, 187 F.3d at 409. The claim was presented to the state court, then, as one of ineffective assistance yet presented to the federal court as a due process violation. Under Duncan, therefore, Ramdass failed properly to preserve his Ake due process claim for federal court review and it is thus not appropriate for certiorari review.

B. The claim is not controlled by Ake and thus is barred by the "new rule" doctrine.

In Ake v. Oklahoma, the issue was whether and when a State had a due process obligation to provide an indigent capital defendant with the services of a mental health expert. Ake in no way dealt with the issue of whether there is a cognizable constitutional claim of "ineffective assistance" of mental health expert, the precise claim that Ramdass has raised in his federal petition. Indeed, Ake not only did not address the quality of the mental health expert's performance, but it expressly held that a defendant has ***no right to choose a particular expert***. See Ake, 470 U.S. at 83. Ake, therefore, simply does not govern Ramdass' complaint.

Thus, to the extent Ramdass relies on Ake for relief, his claim undoubtedly is barred by the "new rule" doctrine. This Court has refused to extend the Strickland-type inquiry regarding effective assistance of trial counsel to claims of ineffective assistance of habeas counsel. See Coleman v. Thompson, 501 U.S. 722, 752 (1991). The Court never has suggested that there exists an even more remote right to the "effective assistance" of a mental health expert. Clearly, such a novel question, if ever addressed, must be tackled on direct review. There is no existing authority compelling acceptance of such a claim. Thus the claim is barred from review in federal collateral proceedings by the "new rule" doctrine. See Gray, 518 U.S. at 169.

C. Ramdass' "conflict" argument is groundless.

Ramdass argues that cases from five other circuits demonstrate a conflict over the application of Ake. His contention goes as follows: the Fourth Circuit held that there is no right to an expert in sentencing under Ake unless the defendant's mental health is at issue or the prosecutor himself uses an expert to prove future dangerousness, but the Tenth, Eleventh, Eighth, Ninth and Sixth Circuits have held that Ake applies even when the prosecutor does not use an expert. In his dissenting and concurring opinion below, Judge Murnaghan rejected Ramdass' Ake claim because "Ake's application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court" and thus is barred by § 2254(d)(1). Ramdass, 187 F.3d at 411. Under either § 2254(d)(1) or the "new rule" doctrine, Judge Murnaghan undoubtedly was correct. If, in fact, the circuits are in conflict over what Ake requires before the State must appoint an expert, then the issue is *per se* barred by the new rule doctrine in this collateral case because it is a paradigmatic example of an issue that is "susceptible to debate among reasonable minds." See O'Dell, 521 U.S. at 159, quoting Butler v. McKellar, 494 U.S. 407, 415 (1990). Thus, if the issue is to be resolved, it must be decided on direct review and not in this collateral case.

The most glaring problem with Ramdass' "conflict" argument, however, and the reason it really has no effect whatsoever on Ramdass' case, is twofold: first, Ramdass never even presented his Ake complaint about Dr. Samenow to the state court except by way of a claim of ineffective assistance of trial counsel. Ramdass' default only highlights the unfairness to the state courts of considering a claim that was found barred by the federal district court and that only the federal court of appeals reached.

Second, the "conflict" is over when a state court must appoint an expert, a completely moot point in Ramdass', or any Virginia, case. Virginia Code § 19.2-264.3:1 guarantees to all capital defendants - simply for the asking - what the federal courts of appeals supposedly are in conflict over. Ramdass received the benefit of Virginia's extra-constitutional provision. Thus, even if there is a conflict in the federal courts over when Ake requires appointment of an expert, the resolution of that conflict can have absolutely no impact in Ramdass' case. He already received what Ake requires, under ***any*** circuit's interpretation.

Finally, the cases themselves do not demonstrate a conflict with Ramdass' case. First, in Terry v. Rees, 985 F.2d 283 (6th Cir. 1993), the court of appeals held that Ake required the appointment of a ***pathologist***, the denial of which appointment was found to be harmless error. Obviously, that decision is irrelevant to the issues in Ramdass' case and, if anything, is in conflict with this Court's "new rule" doctrine.

Second, of the four remaining cases, three were cases in which the state trial courts had ***denied the defendants' motions for appointment of any independent mental health expert***. See Moore v. Reynolds, 153 F.3d 1086, 1108-09 (10th Cir. 1998) (defendant made proper showing that mental state at issue but denial of expert was harmless), cert. denied, 119 S.Ct. 1266 (1999); Starr v. Lockhart, 23 F.3d 1280, 1290 n.8 (8th Cir.) (denial of independent expert in case error where defendant was retarded and where reasonable probability expert would aid defendant in sentencing), cert. denied, 513 U.S. 995 (1994); Smith v. McCormick, 914 F.2d 1153, 1157-59 (9th Cir. 1990) (trial court's own expert appointed for a competency exam did not fulfil Ake's requirement of an independent expert to assist the defense with sentencing issues), cert. denied, 504 U.S. 901 (1992).

The Tenth and Eighth Circuits in Moore and Starr do note in passing that, although Ake seems to limit the right to an expert to cases where the prosecutor uses one, they see no reason to so limit the right and thus will apply Ake whenever the defendant makes a showing that his mental state will be at issue. The Ninth Circuit in Smith simply does not address Ake's holding that a defendant is entitled to an expert when the prosecutor will be using an expert to prove future dangerousness. The most that these cases prove, however, is that there is a "debate among reasonable minds" over what Ake requires: a debate that, as shown above, only demonstrates the claim's "new rule" character and its irrelevance to Ramdass' case where an expert ***was*** appointed at his request.

In the last case, Clisby v. Jones, 960 F.2d 925, 928 (11th Cir. 1992), the *in banc* court of appeals reversed the district court's granting of habeas relief on the basis of Ake. The court of appeals noted that it did not believe Ake should be restricted to cases where the prosecutor had used expert testimony, found that the appointed expert's performance ***should be examined for competency*** and then found the expert competent. Id. As demonstrated above, such an extension of Ake represents a conflict not with Ramdass' case, but with this Court's "new rule" jurisprudence. (See above at subsection B).

D. Dr. Samenow was competent.

Ramdass never has presented any evidence that Dr. Samenow was or is incompetent under any standard. The record in this case demonstrates that Dr. Samenow was qualified to assist the defense with sentencing issues. He testified for other capital defendants (JA 28-29, 527, 550-616, see also Swann BIO 96-8686) and was appointed in Ramdass' case by a trial judge who believed he "calls it like it is, whether it is in favor of the Commonwealth or the defendant or either one." (JA 28). Indeed, that quality of objectivity no doubt was and is the genesis of

Ramdass' true complaint – that he did not have an expert of his own choosing to say what he wanted the expert to say. However, nothing in Ake or any other authority guarantees a particular result.

Moreover, although Ramdass has lodged with the Court the report Dr. Samenow prepared in preparation for trial, and although Ramdass has failed to inform this Court that the Fourth Circuit expressly denied his motion to supplement the record with this report because it never was presented to any state or lower federal court, the report does not support his claim of incompetence. In fact, the report is a twelve-paged, straightforward recitation of Ramdass' responses to Dr. Samenow's questions as well as an in-depth review of his troubled background and poor upbringing. On the first page of his report, Dr. Samenow recites the fact that he met with Ramdass three times for a total of six and three-quarter hours, that he administered a standard intelligence test, that he interviewed Ramdass' mother, that he reviewed the Virginia Code section charging him with assisting in the formulation of specified mitigating factors and that he reviewed nine prior evaluations performed on Ramdass.

Dr. Samenow recites that, when asked about his mother's report that he had exposed himself in elementary school, Ramdass said, "Everybody did it to girls – show 'em my dick." Ramdass never held a full-time job, lived on the streets, and, according to his mother, had a reputation as "ruthless." Ramdass told Dr. Samenow that he "always kept a gun" since childhood. (Report at 3).

His mother told Dr. Samenow that Ramdass was heavily involved in the selling of cocaine and PCP. Ramdass told Dr. Samenow he had made close to $20,000 selling drugs. His mother said he cursed at a judge who had sentenced him for breaking and entering at age twelve. (Report at 4).

Ramdass also told Dr. Samenow that he never obtained a driver's license and would throw away every ticket he received. He expressed his hatred for the police and admitted that he had escaped from the juvenile institutions in which he had been placed and had brutally assaulted other juveniles while incarcerated. (Report at 5). Ramdass' mother reported that Ramdass' father and her subsequent boyfriends were abusive to Ramdass and the records show that Ramdass lived in foster care for several months when his mother was unable to take care of him. (Report at 7).

The records further showed that Ramdass' background was extremely deprived, neglectful and abusive. Ramdass, however, defended his mother to Dr. Samenow and insisted that she worked hard and tried to take care of him. (Report at 8). Ramdass' mother reported that some of the places they lived were crime-ridden. (Report at 10). And Dr. Samenow concluded that Ramdass was intelligent, albeit uneducated. (Id.).

This report hardly supports a conclusion that Dr. Samenow was ***unqualified*** to evaluate Ramdass.[14] Ramdass chose not to put Dr. Samenow on the stand to testify because Dr. Samenow had concluded that Ramdass was dangerous. No controlling precedent then or now entitled Ramdass to the appointment of a different expert or of an expert who, despite the

[14] This Court denied Dwayne Wright's application for a stay of execution which also was based upon the claim that Dr. Samenow was unqualified under Ake. See Wright v. Angelone, 119 S.Ct. 370 (1998) (No. A-289).

overwhelming evidence to the contrary, would conclude that he was not dangerous. [15]

III. *Ramdass Is Not Entitled To A Stay Based Upon The Grant Of Certiorari In Williams v. Taylor.*

Ramdass briefly argues that this Court should "hold" his case for the decision in Terry Williams v. Taylor, No. 98-8384. In Williams, the Court will decide whether the Fourth Circuit's interpretation of the deference standard in § 2254 (d) was correct. As Ramdass candidly admits (Pet. Quest. 3), however, the Fourth Circuit's recitation of § 2254 (d) in his case represents an alternative holding.

For example, on the Simmons claim, the Fourth Circuit addressed the claim on its merits, found that Simmons did not apply because Ramdass was not ineligible for parole and then ***also*** held that a contrary ruling would run afoul of either § 2254 (d)'s "clearly established" provision or the "new rule" doctrine. Ramdass, 187 F.3d at 406-407. On the Ake claim, the Fourth Circuit held that the Virginia Supreme Court's rejection of the claim was not an unreasonable application of "clearly established federal law" under § 2254 (d) ***because the Ake claim itself had no merit***. Id. at 409. Thus, the Fourth Circuit's judgment does not ultimately rest upon its interpretation or application of § 2254 (d): the judgment rests upon a rejection of the merits of the claims themselves.

[15] No expert testified for either side on the issue of Ramdass' "future dangerousness" and, obviously, no expert opinion was needed. Ramdass' record was one of the worst in Virginia's recent history: he committed a purse-snatching from an elderly woman when he was fourteen. On probation from that offense, he began to sell drugs. Soon after, he stole a moped and broke into a house. He was paroled from that offense, reincarcerated and then escaped. At age seventeen, he robbed a man and was arrested in possession of a gun. Shortly after being paroled again, he obtained a gun and committed six armed robberies. Some of these robberies involved brutal physical violence, including the capital murder. See Ramdass, 437 S.E.2d at 574. Ramdass also was convicted of a second murder he committed in Alexandria in 1992, but that offense was not presented by the prosecution for consideration in the capital sentencing.

This Court should not grant certiorari or a stay of execution on the basis of another case that can have no effect upon the judgment of the Fourth Circuit in Ramdass' case. The Fourth Circuit's opinion clearly demonstrates that its judgment in Ramdass' case – to deny collateral relief – will remain exactly the same regardless of how this Court interprets § 2254 (d) in Williams. See generally Black v. Cutter Laboratories, 351 U.S. 293, 297-298 (1956) (this Court grants certiorari to review "judgments, not statements in opinions").

CONCLUSION

The petition for a writ of certiorari and application for stay of execution should be denied.

Respectfully submitted:

RONALD J. ANGELONE, DIRECTOR

By: Katherine P. Baldwin
Counsel

Mark L. Earley
Attorney General of Virginia

Katherine P. Baldwin
Assistant Attorney General
Counsel of record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY LEE RAMDASS

Petitioner,

v.

RONALD J. ANGELONE,
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit
and on Application for a Stay of Execution

RESPONDENT'S APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 98-30 (L)

BOBBY LEE RAMDASS

Petitioner-Appellee,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellant.

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APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

**PETITIONER-APPELLEE'S MOTION
TO SUPPLEMENT THE RECORD**

Petitioner-Appellee (hereafter "Mr. Ramdass") files this Motion to Supplement the Record pursuant to Rules 10(e) and 27 of the Federal Rules of Appellate Procedure and Fourth Circuit Local Rule 10(e). Specifically, Mr. Ramdass seeks to supplement the record by submitting the twelve-page document entitled "Report of Psychological Evaluation" prepared by Dr. Stanton E. Samenow

Resp. App. 1

on January 5, 1993 (hereafter "Report"). (A copy is attached hereto in the Addendum.) In support of this Motion, Mr. Ramdass states as follows:

1. If material is inadvertently omitted from the record, an appellate court has the power to supplement the record and consider the material in rendering its decision. See Fed. R. App. P. 10(e)(2); Fourth Cir. R. 10(e). This is true even if the material was never presented to the district court. See Fry v. Patseavouras, 974 F.2d 1330, 1992 WL 212146, at *3 n.3 (4th Cir. 1992) (unpublished opinion) (copy attached hereto in the Addendum); Liberatore v. Story, 854 F.2d 830, 833 n.2 (6th Cir. 1988); Ross v. Kemp, 785 F.2d 1467, 1474-75 (11th Cir. 1986); Gibson v. Blackburn, 744 F.2d 403, 405 n.3 (5th Cir. 1984). The record may be supplemented after briefing is underway. See Liberatore, 854 F.2d at 833 n.2 (stating that the motion to supplement was granted "[s]hortly before oral argument").

2. In a death penalty case, it is especially important that a federal appellate court review the case on a complete record. Dobbs v. Zant, 506 U.S. 357, 358 (1993). Indeed, federal appellate courts have unique powers in habeas corpus cases generally. See Ross, 785 F.2d at 1475.

3. A key factor in determining whether the record should be supplemented is the degree of relevance of the material to be added. See Dobbs,

Resp. App. 2

506 U.S. at 359. A second key factor is whether the "interests of justice" would be served by doing so. See Ross, 785 F.2d at 1475. Another factor is whether remand of the case to the district court for the purpose of supplementing the record would be contrary to the efficient use of judicial resources. Id.; Gibson, 744 F.2d at 405 n.3.

4. If a document was omitted from the record but was referred to in documents that were made part of the record, a federal appellate court may supplement the record by adding the underlying document. See Erkins v. Bryan, 663 F.2d 1048, 1052 n.1 (11th Cir. 1981) (motion to supplement unopposed by other party), cert. denied sub nom. United Steel Workers of America v. Erkins, 459 U.S. 989 (1982).

5. Mr. Ramdass seeks to supplement the record with the psychological Report prepared by Dr. Samenow on January 5, 1993. This Report was inadvertently omitted from the District Court record. However, the Report was reviewed by several witnesses whose affidavits were attached to Mr. Ramdass' Petition filed in the District Court. Specifically, the Report was reviewed by Leonard Piotrowski (Mr. Ramdass' trial counsel), Peter Greenspun (Mr. Ramdass' proffered expert on criminal trial practice), and Dr. Reuben Koller (Mr. Ramdass' proffered mental health expert). Mr. Piotrowski states in his affidavit that he

Resp. App. 3

received the Report and he discusses Dr. Samenow's views expressed therein. (Fourth Circuit Joint Appendix ["JA"] 445.) Dr. Koller states in his affidavit that he reviewed the Report. (JA 472.) He also discusses the Report and the shortcomings in Dr. Samenow's approach as reflected in the Report. (JA 474-75.)

6. Because Mr. Ramdass asserts that Dr. Samenow was wholly ineffective as a mental health expert and because Mr. Ramdass submits that his trial counsel were ineffective for not objecting to Dr. Samenow's appointment, Dr. Samenow's Report is unquestionably relevant to this habeas appeal. The Report is especially crucial on these issues because it was prepared by Dr. Samenow a mere three weeks before Mr. Ramdass' trial.

7. To remand this case to the District Court simply to admit the twelve page Report would not be an efficient use of judicial resources. The interests of justice would be served, however, if this Court were to consider the Report in assessing Mr. Ramdass' claims concerning Dr. Samenow.

8. Given the clear relevance and crucial nature of Dr. Samenow's Report, and given the inadvertence of its omission, Mr. Ramdass respectfully requests that this Court supplement the record by adding the Report to the materials to be considered in this case.

Resp. App. 4

9. Katherine P. Baldwin, counsel for Respondent-Appellant, has indicated that Respondent-Appellant will oppose this Motion to Supplement the Record.

Respectfully submitted,

BOBBY LEE RAMDASS

BY: _____

John M. Ryan (VSB #4301)
F. Nash Bilisoly (VSB #19066)
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Michele J. Brace (VSB #36748)
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
1001 E. Main Street
Richmond, VA 23219
(804) 643-6845

Resp. App. 5

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 1999, a true copy of the foregoing pleading was mailed to:

Katherine P. Baldwin
Assistant Attorney General
Office of the Attorney General
900 E. Main Street
Richmond, VA 23219

John M. Ryan (VSB #4301)
F. Nash Bilisoly (VSB #19066)
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Resp. App. 6

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Criminal Litigation Section
Office of the Attorney General

FILED: July 29, 1999

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-30(L)
(CA-96-831-2)

BOBBY LEE RAMDASS,

Petitioner - Appellee,

versus

RONALD J. ANGELONE, Director, Virginia Department of Corrections,

Respondent - Appellant.

ORDER

Appellee/cross-appellant has filed a motion to supplement the record pursuant to Rule 10(e) of the Federal Rules Of Appellate Procedure and this Court's Local Rule 10(e). Appellant/cross-appellee filed a response in opposition to the motion, and appellee/cross-appellant filed a reply in support of the motion. Appellee/cross-appellant has also filed an application for certificate of appealability for his cross-appeal, No. 98-32.

The Court denies appellee/cross-appellant's motion to supplement the record and grants appellee/cross-appellant's application for certificate of appealability in No. 98-32.

Resp. App. M

Entered at the direction of Judge Niemeyer with the concurrence of Judge Murnaghan and Judge Widener.

For the Court

/s/ Patricia S. Connor
Clerk

Resp. App. 8

LAW OFFICES
VANDEVENTER BLACK LLP

500 WORLD TRADE CENTER
NORFOLK, VIRGINIA 23510-1699
(757) 446-8600
FACSIMILE (757) 446-8670

F. NASH BILISOLY
nbilisoly@vanblk.com

November 12, 1999

Ms. Cynthia Rapp, Clerk
United States Supreme Court
1 First St. NE
Washington, DC 20543

Re: *Bobby Lee Ramdass v. Ronald J. Angelone, Director of the Virginia Department of Corrections.*
Fourth Circuit C.A. No. 2:96cv831

Dear Ms. Rapp:

In conjunction with the Petition for Certiorari filed by Petitioner in this matter, enclosed please find a copy of a videotape transcript of the CBS news program *60 Minutes* on February 20, 1977 and the report of Psychological Evaluation prepared by Dr. Stanton E. Samenow, dated January 5, 1993 and for lodging with the Court.

Thanking you for your attention to this matter, I remain

Very truly yours,

F. Nash Bilisoly

FNB/ebi
Enclosures

cc: Katherine P. Baldwin, Esq.
w/o Enclosures

Resp. App. 9

(5)

No. 99-7000
A. 99A416

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
November 23, 1999

Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
Suite 510
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

***F. Nash Bilisoly**
John M. Ryan
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Counsel of Record

16 pp

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Argument

As Ramdass' petition demonstrated, this case squarely presents two significant and recurring issues of national importance that should be resolved by this Court. In the Brief in Opposition ("BIO"), Respondent fails to offer a single valid reason why certiorari should not be granted. Instead, Respondent prematurely advances the reasons why he thinks Ramdass ought not to prevail on the merits if this Court grants review.

I. Ramdass' Claim Is Governed by This Court's Decision in *Simmons v. South Carolina*, and Not by an Extension of the Rule in That Case

The first question Ramdass has presented concerns the Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The federal magistrate judge, the district court judge, and one of the three judges on the Fourth Circuit panel all read the *Simmons* decision itself as holding that a capital defendant is entitled to inform the jury of parole impossibility whenever the state seeks death based on future dangerousness and "the only available alternative sentence to death is life without the possibility of parole." *Id.* at 177 (O'Connor, J., concurring). Due process prohibits the state from "securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment mean[s] life without parole." *Id.* at 161 (plurality opinion).

The Virginia Supreme Court and two of the Fourth Circuit judges read *Simmons* as applying only when the defendant is technically ineligible for parole at a specific point in time.[1]

[1] Neither Respondent nor the jurists who agree with him have pinpointed the exact moment when a court is supposed to determine the defendant's parole status. Is it the beginning of the sentencing trial, when the defendant may want to put on evidence about his parole status? Is it the end of the sentencing trial, when he may want an instruction defining "life imprisonment"? Judge Murnaghan believed that the correct date is when the court accepts the jury's recommendation and enters the death sentence. "Ramdass had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole." App. 20. Under Judge Murnaghan's timeline, Ramdass was *technically* ineligible for parole on the relevant date. His death sentence for the capital murder was officially entered on April 2, 1993, which was six weeks after the judge reduced to judgment the jury's verdict in the Domino's Pizza robbery trial.

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If the defendant is technically eligible for parole, the rule in *Simmons* does not apply — even if everyone but the jury knows for a certainty that there is no "possibility of parole."

The disagreement between these two groups of jurists is rooted in their employment of contrary standards for discerning the rule in *Simmons*. The jurists who agree with Ramdass used a functional mode of analysis and looked to the federal consequences of state law on parole eligibility. The jurists who agree with Respondent used a strictly technical mode of analysis and looked only to the state's own characterization of its own law. Clarification of the correct mode of analysis has import far beyond Ramdass' individual case because there are numerous ways in which defendants may be technically eligible for parole at a particular instant, and yet have no possibility of parole. Ramdass identified several of these ways at pp. 20-22 of his petition. Respondent replies not at all.

Respondent's only argument against certiorari — that Ramdass seeks an impermissible "extension" of *Simmons* — depends on the assumption that *Simmons* announced a technical rule rather than a functional rule. For purposes of certiorari, that argument puts the cart before the horse. The jurists who voted to grant habeas corpus relief all concluded that Ramdass was not seeking any "extension" of *Simmons*; rather, his case comes squarely within the core rule announced there that

the defendant has a due process right to inform the jury that the only alternative to death is a sentence of life without the possibility of parole.[2]

To the extent Respondent even acknowledges a tension between the modes of analysis, his arguments are misdirected and, in some respects, just plain wrong. First, this Court clearly employed a functional mode of analysis itself in *Simmons*. As Ramdass carefully documented in his petition at 26-29, South Carolina insisted (and Simmons effectively conceded) throughout the proceedings in this Court that Jonathan Simmons remained technically eligible for parole until the parole board made a formal declaration to the contrary.[3] The witness who testified at trial about Simmons' parole status made clear that he was operating on an assumption, rather than a formal declaration, of parole ineligibility. Notwithstanding the undisputed facts showing that Simmons was technically eligible for parole, Justice Blackmun wrote that Simmons presented "evidence conclusively establishing his parole ineligibility," *Simmons*, 512 U.S. at 158 (plurality opinion), and further noted that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate," *id.* at 166 (plurality opinion). The only way

[2] Respondent suggests that under Ramdass' reading of *Simmons*, the jury could be informed only by a convoluted instruction like that set out in the BIO at 21. That is nonsense. *Simmons* requires the trial court to consider the totality of circumstances and to determine whether the defendant, if sentenced to life imprisonment, will ever have the opportunity to be considered for parole. Once the court concludes that the answer is no, it does not matter how the court arrived at that decision. The court will give the jury a simple, straightforward instruction like the following:

> You are instructed that if you sentence the defendant to life imprisonment, there is no possibility of parole before the end of his natural life. The defendant will never come up for parole consideration.

[3] Respondent asserts that Simmons was ineligible for parole at the time of his trial, but he does not include a single citation to the pleadings or the record in *Simmons* that supports this assertion or that refutes Ramdass' citations and authorities.

to harmonize Justice Blackmun's statements with the clear record is to acknowledge that he was referring to Simmons' pragmatic, functional ineligibility for parole, not his legalistic, technical ineligibility.[4] Any other reading of the plurality opinion would prompt the untenable conclusion that Justice Blackmun was ignorant of the record or that he misrepresented it.

Second, Respondent distinguishes on their facts the cases from this Court which show that (a) questions concerning the nature or duration of restraints on liberty require a functional mode of analysis, and (b) questions of federal law require courts to look to the consequences of state law rather than just to the state's characterization of that law. Ramdass, of course, did not present those cases for their facts; he identified them because they set out the analytical precedent that the Fourth Circuit ought to have followed when Respondent appealed the district court's grant of the writ. Respondent does not, and cannot, take issue with that precedent.

Finally, Respondent challenges any characterization of the entry of judgment on the Domino's Pizza robbery as a ministerial act. Admittedly, the judge in the Domino's Pizza trial had limited discretion to set aside the jury's verdict under Virginia Supreme Court Rule 3A:15(b) "for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction." App. 67. Neither of these conditions existed here, and Respondent does not pretend otherwise. More importantly, the Virginia Supreme Court necessarily concluded on remand that intervention under Rule 3A:15(b) was one of those "hypothetical future

[4] Respondent professes not to understand the term "functional ineligibility for parole," which he calls "nebulous" and "undefined." BIO at 12, 17, 20. A functional determination of parole ineligibility is simply a determination made by looking at how state law actually operates, rather than its technical terms. In Simmons' case, state law would operate so as to result in a subsequent formal declaration by the parole board that Simmons was ineligible for parole, and it would further operate so that Simmons would never have the opportunity to be considered for parole.

developments" that must be disregarded. *Simmons*, 512 U.S. at 166 (plurality opinion). If the state court had not reached this conclusion, it could not have counted the Pizza Hut verdict as a "strike" because that verdict was equally vulnerable to being set aside under Rule 3A:15(b).[5]

Respondent boldly states that "Ramdass does not argue that *Simmons* or any cases interpreting *Simmons* compel a decision in his favor." BIO at 18. Nothing could be further from the truth. During the sentencing phase of a capital murder trial, Virginia prosecutors may introduce virtually any evidence, adjudicated or unadjudicated, bearing on whether the defendant might be a danger to society if ever released. Realizing that capital murder defendants typically are not the most upstanding members of the community, this Court recognized in *Simmons* that the only way a defendant can rebut the evidence of future dangerousness is often to show that he will never *be* in society:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

Simmons, 512 U.S. at 164 (plurality opinion). Jonathan Simmons, who was technically eligible for parole at the time of his sentencing trial, but who clearly was never going to have the opportunity to be called before a parole board, was entitled by due process to tell his sentencing

[5] Respondent also includes a confusing and irrelevant discussion about whether "the judgment in the capital murder case" could have been set aside. BIO at 22. Although this is a point that the magistrate judge found important, it is unrelated to any argument in Ramdass' petition, and it is unrelated to any point raised by either the majority or dissent below. The Virginia Supreme Court held that the capital murder verdict counted as a "strike" even though judgment had not yet been entered, and neither party has taken issue with that determination.

jury of the virtual impossibility of that event ever occurring. That result, and the underlying logic, compels both certiorari and, ultimately, reversal.

II. Respondent Concedes a Split in the Circuits on the Meaning of *Ake*, and It Advances No Cogent Arguments As to Why Certiorari Should Be Not Be Granted.

In response to Ramdass' second question presented, referring to the Fourth Circuit's narrow and literal reading of *Ake v. Oklahoma*, 470 U.S. 68 (1985), Respondent offers four arguments, none of which has merit.

First, Respondent argues that Ramdass' *Ake* claim is defaulted. The Fourth Circuit, which is well known for its zealous enforcement of procedural defaults, expressly held that Ramdass fairly presented his *Ake* claim in the state habeas petition. App. 14. Respondent now argues that the Fourth Circuit was wrong, and that the claim was actually defaulted because it was not exhausted in state court.[6] Respondent is wrong. As the Fourth Circuit correctly stated, the standard is whether the petitioner "fairly presented" his federal claim to the state court. *Id.*; *see, Picard v. Connor*, 404 U.S. 270, 277 (1971). If a habeas petitioner has fairly presented the state court with the "substance" of his federal claim, he has satisfied this standard. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

Respondent does not dispute that Ramdass alleged in his state habeas petition that he "was denied the reasonable assistance of a mental health expert." (JA 229). Nor does respondent dispute that Ramdass specifically cited and summarized the holding in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) and the Eighth and Fourteenth Amendments as federal bases

[6] Virginia law would not permit Ramdass to return to state court to exhaust this claim. Under the rule in *Teague v. Lane*, 489 U.S. 288, 297-98 (1989), the Court would have to treat this claim as defaulted if Ramdass did not fairly present it in the original state habeas petition.

for this allegation. (JA 229). Respondent does not dispute that Ramdass alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. (JA 229). Rather, respondent's complaint is that Ramdass presented this allegation and this law and these facts under a heading that referred solely to ineffective assistance of counsel.[7] This Court has never held that the heading for a claim, rather than the substance of the claim, controls the question of exhaustion. Indeed, the Court has suggested the opposite. *See, e.g., United States v. Minker*, 350 U.S. 179, 185 (1956) (holding that title of statute and heading of section cannot limit plain meaning of the text). The discrepancy between the heading and the substance of Ramdass' claim is no ground for default, and it is no ground for denying certiorari.

Second, Respondent argues that Ramdass is asking the Court to announce a new rule in violation of the antiretroactivity doctrine. In order to make this argument, however, Respondent must first create a straw man and then knock it down. Respondent builds that straw man by simply (and wrongly) recharacterizing Ramdass' claim. Ramdass alleges that Dr. Samenow, even at his best, was *incapable* of providing the assistance guaranteed by *Ake* because he harbored preconceived and radical views which rejected mental illness, rejected mitigation, and labeled psychiatry a tool for "excuses for crime." Respondent, however, recasts this as an allegation that Dr. Samenow did not render "effective assistance," as measured by the ndard in *Strickland v. Washington*, 466 U.S. 668 (1984). Respondent then predictably argues that such an

[7] Ramdass paired, under one heading, both his substantive allegation based on *Ake* and his closely related claim that trial counsel rendered ineffective assistance in failing to challenge Dr. Samenow's appointment.

"ineffectiveness" claim would be barred by the new rule doctrine. The Court should not be diverted by this non-issue, which does not advance nor even address the question of whether this Court should grant certiorari to resolve the important question actually presented in the petition for certiorari.[8]

Third, Respondent dismisses the split in the circuits as trivial. Respondent concedes, as he must, that in post-*Teague* habeas corpus cases, the Fourth and Fifth Circuits disagree with the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits on the important question of whether an indigent criminal defendant's constitutional right to the assistance of a mental health expert in the sentencing phase of a capital trial is limited to cases where the state presents psychiatric evidence of future dangerousness.[9] Respondent glibly dismisses the conflict as groundless because in his view, the courts that disagree with the Fourth Circuit rendered decisions that conflict with the new rule doctrine. For purposes of certiorari, respondent's argument again puts the cart before the horse. The jurists who disagree with the Fourth Circuit all concluded that their decisions were squarely within the core rule of *Ake*.

Although respondent notes that some of the cases from other circuits concern the trial court's *actual* failure to appoint a mental health expert rather than its *constructive* failure to

[8] Respondent also attempts to rehabilitate Dr. Samenow in order to show that he was not "ineffective." This is the wrong forum for such efforts. Neither the district court nor the Fourth Circuit ever reached the fact-based issue of Dr. Samenow's competence, and the question presented in Ramdass' petition is whether the lower court was required to consider the merits of Ramdass' allegation even though the prosecution did not present psychiatric evidence of future dangerousness.

[9] Respondent quarrels with Ramdass' characterization of the Sixth Circuit's position, because the case there dealt with the defendant's right to a pathologist. *Ake*, of course, does not mention any right to a pathologist. If the Sixth Circuit reads *Ake* not being limited to its facts with respect to the kind expert, it surely reads *Ake* far more broadly than the Fourth Circuit.

appoint an expert — which is what the appointment of Dr. Samenow amounted to — this is irrelevant to the proper scope of *Ake*. Indeed, the fact that the trial court agreed that Ramdass was entitled to the assistance of a mental health expert makes Ramdass' case a stronger candidate for certiorari, as Ramdass explained in his petition.

The correct reading of *Ake* is an issue of national importance that respondent has attempted to deflect by introducing collateral local issues that have no ultimate bearing on the question presented to this Court. Respondent offers no compelling reason why this Court should not resolve this important issue.

Finally, in what is really a breach of civility unusual among Virginia lawyers, respondent's counsel virtually accuses Ramdass' counsel of attempting to somehow deceive this Court by lodging Dr. Samenow's report without advising the Court that it was not part of the record below. Although the status of the report has no bearing on the certworthiness of the questions presented, Ramdass feels constrained to address this *ad hominum* attack and to dispel any inference of wrongdoing.

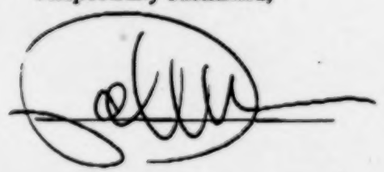
Both Ramdass *and* Respondent quoted from or paraphrased Dr. Samenow's report at length in their briefs to the court of appeals, just as they have done here, even though the report itself was not formally a part of the record. Counsel's decision to lodge the report with this Court was thus completely appropriate and above-board. The fact that the report was separately lodged, rather than contained in the Fourth Circuit joint appendix, surely put this Court on notice that the report was not a part of the record. Respondent's complaint, that Ramdass did not

explain to the Court *why* it was not in the record, is unfounded.[10] Ramdass lodged Dr. Samenow's report simply because it has been interwoven with the pleadings below and in this Court, and because he reasonably anticipated that a Member of the Court might want to examine it. For Respondent to refer extensively to Dr. Samenow's report, and then to insinuate that counsel for Ramdass attempted to mislead the Court by lodging that report — is inappropriate in this setting, is certainly untrue, and, frankly, is unseemly.

CONCLUSION

For the foregoing reasons, the Court should stay Ramdass' imminent execution and grant a writ of certiorari on each of the questions presented.

Respectfully submitted,



Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, Virginia 23219
(804) 643-6845

*F. Nash Bilisoly
John M. Ryan
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 466-8600

**Counsel of Record*

[10] On appeal to the Fourth Circuit, counsel for Ramdass realized that, through oversight, the report itself was not actually a part of the record. Counsel moved to expand the record, and the Fourth Circuit deferred consideration of this motion pending oral argument. *See* Fourth Circuit Order dated April 27, 1999 (copy appended). The Fourth Circuit ultimately denied this motion long after oral argument, and only five days before it issued its opinion on August 3. *See* Resp. App. 7-8. The court of appeals gave no reason for this action. Since the Fourth Circuit never reached the merits of the *Ake* issue, however, that court most likely concluded that the report was superfluous.

No. 99-7000
A. 99A416

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY LEE RAMDASS,
Petitioner,
v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CERTIFICATE OF SERVICE OF REPLY BRIEF

I hereby certify that I am a member of the Bar of this Court and that on November 19, 1999, pursuant to Rule 29.3 of the Rules of United States Supreme Court, I caused a copy of the Reply Brief to be served by facsimile and regular mail on Katherine P. Baldwin, Esq., Assistant Attorney General, 900 E. Main Street, Richmond, VA 23219.

F. Nash Bilisoly

FILED: April 27, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-30(L)
(CA-96-831-2)

BOBBY LEE RAMDASS,

Petitioner - Appellee,

versus

RONALD J. ANGELONE, Director, Virginia Department of Corrections,

Respondent - Appellant.

ORDER

Appellee/cross-appellant has filed a motion to supplement the record pursuant to Rule 10(e) of the Federal Rules Of Appellate Procedure and this Court's Local Rule 10(e). Appellant/cross-appellee filed a response in opposition to the motion, and appellee/cross-appellant filed a reply in support of the motion.

The Court defers action on the motion to supplement the record until oral argument of these cross-appeals.

For the Court

/s/ Patricia S. Connor
Clerk

(6)

Supreme Court, U.S.
FILED
FEB 2-2 2000
CLERK

No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, Director,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
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F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Counsel for Petitioner

MARK J. EARLEY
Attorney General of
Virginia

KATHERINE P. BALDWIN
Assistant Attorney General
Counsel of Record
Office of the Attorney
General
900 East Main Street
Richmond, VA 23219
(804) 786-4624

Counsel for Respondent

[Additional Counsel Listed On Inside Cover]

Petition For Certiorari Filed November 16, 1999
Certiorari Granted January 7, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
Suite 510
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

Of Counsel

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VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	
-vs-	CRIMINAL DOCKET NO. 77396
BOBBY LEE RAMDASS,	(Filed April 29, 1993)
Defendant.	

Circuit Courtroom No. 4G
Fairfax County Judicial Center
Fairfax, Virginia

Thursday, January 28, 1993

The above-entitled matter came on for trial before THE HONORABLE QUINLAN H. HANCOCK, Judge, and jury, in and for the Circuit Court of Fairfax County, Virginia, commencing at 10:00 o'clock a.m.

* * *

[64] not to discuss this with anyone, but I would certainly highly advise you not to until these entire matters are concluded. Thank you again.

THE COURT: The court stands in recess.

(Whereupon, at 11:59 o'clock a.m., the trial in the above-entitled matter stood in recess.)

(Whereupon, at 3:20 o'clock p.m., the jury returned to the courtroom.)

VERDICT

THE CLERK: Members of the jury, have you reached your verdict?

THE JURY: Yes, we have.

THE CLERK: Is your verdict unanimous?

THE JURY: Yes.

THE CLERK: We, the jury, on the issue joined in the case of the Commonwealth of Virginia versus Bobby Lee Ramdass, Defendant, find the Defendant guilty of Count III, using a firearm while committing the murder of Mohammad D. Kayani, as charged in the Indictment, and fix his punishment at a term of imprisonment of four years.

We, the jury, on the issue joined in the case of the Commonwealth of Virginia versus Bobby Lee Ramdass, [65] Defendant, find the Defendant guilty of Count I, capital murder, during the commission of a robbery while the Defendant was armed with a deadly weapon, as charged in the Indictment.

THE COURT: Either counsel – any counsel want the jury polled?

MR. PIOTROWSKI: I would request that the jury be polled, Your Honor.

THE CLERK: If this is your verdict, please answer yes when I call your name. If not, answer no.

POLLING OF THE JURY

THE CLERK: John Tkach.

MR. TKACH: Yes.

THE CLERK: Jane May.

MS. MAY: Yes.

THE CLERK: Michael Volpe.

MR. VOLPE: Yes.

THE CLERK: Peter McClellan.

MR. McCLELLAN: Yes.

THE CLERK: Joanne Padberg.

MS. PADBERG: Yes.

THE CLERK: Thomas Schuessler.

MR. SCHUESSLER: Yes.

[66] THE CLERK: Mary McDaniel.

MS. McDANIEL: Yes.

THE CLERK: Gary Shavlik.

MR, SHAVLIK: Yes.

THE CLERK: Ruth McEntire.

MS. McENTIRE: Yes.

THE CLERK: Peggy Sillex.

MS. SILLEX: Yes.

THE CLERK: Margaret McNette.

MS. McNETTE: Yes.

THE CLERK: Patrick Noud.

MR. NOUD: Yes.

THE CLERK: Ladies and gentlemen, that will conclude the proceeding for today. What I would ask you to do, please, is to return tomorrow morning, not at 10:00, but at 9:00, if you will, please.

During the overnight recess please do not discuss the matter with anyone.

Nine o'clock tomorrow morning, please.

(The Jurors retired from the courtroom, and the following was had outside the hearing of the jury.)

THE COURT: Mr. Ramdass, if you will please stand.

* * *

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	CRIMINAL DOCKET NO. 77396
-vs-	
BOBBY LEE RAMDASS,	(Filed April 29, 1993)
Defendant.	

Fairfax County Judicial Center
Courtroom 4G
Friday, January 29, 1993

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE QUINLAN H. HANCOCK, Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, 4110 Chain Bridge Road, Fairfax, Virginia, beginning at 9:00 o'clock a.m.

* * *

[8] murder.

I think under that case we're closed out on the violence theory and we will be proceeding under the alternative theory of future dangerousness in the course of this sentencing trial.

THE COURT: All right. Your motion is granted.

MR. PIOTROWSKI: Thank you, Your Honor.

THE COURT: At the beginning of this matter there was a rule on the witnesses in this case, including

the Defendant's mother through the penalty stage. She was to be excluded during this phase

Are there any witnesses in the Courtroom at this time?

(No response.)

I'll leave it up to counsel to recognize any witnesses who may appear in the Courtroom.

MR. PIOTROWSKI: I recognize none at this time, Your Honor.

THE COURT: Any thing further before we bring the Jury in?

MR. HORAN: Your Honor, is there any special way you want us to number the exhibits for purposes of the

* * *

[12] can make the determination whether or not there is a possibility or I'm sorry, probability that he would commit future acts of violence, future acts of dangerous conduct, the so called dangerousness prong of capital punishment law.

We will present to you evidence, among other things, not going into it all, that in 1988 he was convicted of a strong arm robbery. Beat a man in the course of that robbery. The police went out hunting for him, arrested him. He was found in his home in the bed, a loaded pistol on the nighstand beside him.

The officer placed him under arrest, cuffed him, took him out of the house. He broke and ran. The officer

chased him. They had battle and the officer finally arrested him.

The evidence will be he was still a juvenile at that time, sixteen, almost seventeen years of age. He was certified to stand trial as an adult and eventually was tried as an adult. Pled guilty to the strong arm robbery and was sentenced to serve seven years in the Virginia Penitentiary. That sentence was rendered in the summer of 1988.

The evidence will be he went to the [13] Penitentiary of Virginia, went to South Hampton, which is a place for youthful offenders. He served time and was finally paroled in May of 1992.

Among other things, our evidence will be that beginning in the summer of 1992, he committed a great number of criminal violations.

Among those violations we'll present to you evidence of things he did in August of 1992. On August 25, 1992, the evidence will be he was one of the gunmen in the armed robbery of the Pizza Hut restaurant.

He was tried for that robbery. He was convicted of that robbery and in that proceeding he wound up with convictions for two robberies, the use of a gun in two robberies and abduction of one of the women that was in the store. That was August 25, 1992.

The evidence will be that on August 29th, 1992, he and another man entered the Bragg Towers Hotel, just off Route 95. They entered and this Defendant at the point of a gun demanded the money of the clerk. The clerk was cooperating and he told the clerk to turn his back, the

evidence will be the clerk was afraid he was going to be shot. Wouldn't turn his back.

The evidence will be that this Defendant [14] brutally assaulted that clerk. Struck him with the gun and pistol whipped him and eventually took his money. August 29th, 1992.

The evidence will be on August 30th, 1992, this Defendant with Eddie O'Connor, Shane Singh, and a young man by the name of Theo Sharp, went driving around in Arlington, right in the area of where 395 splits Arlington into the north half and the south half.

Over by National Orthopedic Hospital they stopped. They intended to go in and rob one of the motels over there. This Defendant, armed with the same .38 with which he killed Mr. Kayani, Eddie O'Connor and Shane Singh walked through a long tunnel that goes underneath 395, emerged on the other side headed for the motel where they were going to do the robbery.

As they were going along they saw a man drive in and park his car in the park. The man was driving a taxi cab, Silver Cab. The man was named Emmanuel Selassie. Emmanuel Selassie is a cab driver. Been in this country about twenty years. He works as a cab driver off and on. Was finishing a couple of hours of work as a cab driver that day, pulled in to the parking place.

The evidence will be that Ramdass says let's [15] get that guy. They approached the cab. O'Connor got in one side and Ramdass put the gun to the head of the cab driver. Right here. (Indicating) Tore apart his face.

He said give us your money. The man said hold it. Don't get excited. I'll give you what I got. It was in his pockets. He had fifty bucks. He didn't turn because the gun was right there. He handed the money out. He said that's all of got. I don't have anything else.

The evidence will be that Ramdass clicked the gun and shot him. It went through is head and came out over here. (Indicating)

He was left there lying in that cab in a pool of blood and he survived the whole thing.

He'll be here this morning to testify to you about that shooting.

Members of the Jury, our evidence will be designed to show you the potential for future dangerousness on the part of this Defendant is clear.

At the end of all the evidence we will ask you to sentence him to death. Thank you.

THE COURT: Mr. Piotrowski?

MR. PIOTROWSKI: Your Honor, I requested that I defer my opening statement.

[16] THE COURT: All right. Who's your first witness, please?

MR. HORAN: Investigator Farrell.

EVIDENCE ON BEHALF OF THE COMMONWEALTH

Whereupon

INVESTIGATOR G. W. FARRELL

a witness, was called for examination by counsel on behalf of the Commonwealth and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name please and your occupation?

A G. W. Farrell, Investigator, Fairfax County Police Department, currently assigned to the robbery squad.

Q How long have you been a police officer?

A Approximately sixteen years.

Q How long have you been assigned to the robbery squad?

A Approximately seven years.

Q Did there come a time that you got involved in an investigation into the robbery of a man by the name of [17] Frederick Thompson?

A Yes, sir.

Q When and where did that robbery occur?

A That occurred on February 20th, 1988. It occurred in front of 3501 Holly Hill Road which is located within Fairfax County in the Route 1 area.

Q What kind of robbery was that?

A A strong arm robbery.

Q Did there come a time when you took the Defendant into custody for that robbery?

A Yes, sir.

Q How did you receive him?

A It was at the Mount Vernon substation. He had already been placed under arrest.

Q Who had done that; do you know?

A An Officer Scott Colvert.

Q Directing your attention to May of 1988.

Did you testify before the Grand Jury in that case?

A Yes, sir, I did.

Q And did an indictment of this Defendant result?

A Yes, sir.

[18] Q Do you know what ultimately happened with that indictment?

A Yes, sir. It went to Circuit Court where he was found guilty and I believe received seven years.

Q Was he an adult or a juvenile at the time that offense was committed?

A At the time he was a juvenile and he was tried as an adult.

Q Is there some procedure that is followed in order to do that?

A Yes, sir. You have to go through Juvenile Court where they have the proper procedures where he is checked for record and everything. Goes in front of the Judge –

MR. PIOTROWSKI: I'm going to object, Your Honor, it's a statement as to what the procedures are and what the law is that's applicable.

THE COURT: His answer yes is sufficient.

MR. PIOTROWSKI: Thank you.

THE COURT: Yes, sir. What's your next question?

BY MR. HORAN:

Q Was he in fact certified to stand trial as an [19] adult?

A Yes, sir.

MR. HORNA: Your Honor, I would offer into evidence as Commonwealth's Exhibit Number 1A the indictment for robbery. As 1B the guilty finding upon a plea of guilty on June 8th of 1988 and as Commonwealth's Exhibit Number 1C, the sentencing order where on July 15th, 1988, he was sentenced upon his conviction of that robbery.

THE COURT: Have you seen them, Mr. Piotrowski?

MR. PIOTROWSKI: I have seen them, Your Honor, and I have no objection to any of those.

THE COURT: All right. If you'll give them to the Clerk, 1A, 1B and 1C.

(The documents referred to above were marked Commonwealth's Exhibit Nos. 1A, 1B and 1c, for identification.)

(The documents heretofore marked Commonwealth's Exhibit Nos. 1A, 1B and 1C for identification were received in evidence.)

• • •

[22] A Yes sir, I do.

Q How long have you know him?

A Since 1985.

Q What was the first connection you had with him?

A My first connection was an investigation that I conducted in which Mr. Ramdass was identified as a person who had committed a purse snatch of an elderly female on Beacon Hill Road.

Q Did you arrest him in connection with that?

A Yes, sir, I did.

Q What if anything did he tell you about the purse snatch?

A Mr. Ramdass explained to me the reason that he had stolen the purse was that he had purchased a moped from an individual. He had not paid that person back and he owed that person some money. That's why he took the purse.

Q Now, directing your attention to March 4, 1988, did you have occasion to make an arrest of the Defendant on that day?

A Yes, sir, I did.

Q Will you tell His Honor and the Jury how that

* * *

[28] Whereupon

INVESTIGATOR GARY A. HEALY

a witness, was called for examination by counsel on behalf of the Commonwealth and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name please and your occupation?

MR. PIOTROWSKI: Your Honor, if we may have just a minute. We have – we apparently have a witness that has entered the Courtroom.

(Brief recess.)

THE WITNESS: I'm Investigator Gary A. Healy, I'm an investigator with the Fairfax County Police Department assigned to the robbery section of the major crimes bureau.

BY MR. HORAN:

Q How long have you been a police officer?

I've been a police officer for almost twenty three years. I've been an investigator for almost sixteen.

Q Did there come a time when you became involved [29] in an investigation into the robbery of the Pizza Hut that occurred on August 25, 1992?

A Yes, sir, on the following day.

Q And did there come a time when you were involved in arrests in connection with that incident?

A September 10th and September 11th of this year, yes, sir. I mean last year.

Q And tell us who was arrested in connection with that?

A The Defendant to my right, (Indicating), Shane Singh, Eddie O'Connor and another gentleman by the name of Theo Sharp.

Q Directing your attention to September of 1992, did you appear before the Fairfax County Grand Jury?

Yes, sir.

Q In connection with that event?

A I did.

Q Did you testify in the case of Commonwealth versus Bobbie Ramdass?

A I did.

Q Do you recall what he was indicted for in September of '92?

A He was indicted for two robberies, one [30] abduction and two counts of using firearms in those crimes.

Q That's the Pizza Hut crime?

A Yes, sir.

Q What was the abduction charge?

A The abduction was one of the employees that was taken at gun point in the restaurant. Forced from one part of the restaurant to the other.

Q And who was that employee?

A A girl, Robina Khun.

Q How many gunmen were involved in that robbery?

A There were two gunmen in that robbery.

Q And who were they?

A Shane Sing was one of the gunmen. The Defendant to my right was the other gunman.

Q Was anyone injured in the course of that robbery?

Yes, sir. One of the victims, Richard Imlow, was struck by the gunman, later identified as the Defendant after the robbery was complete.

MR. HORAN: Your Honor, I would offer into evidence as Commonwealth's Exhibit Number 2A the indictment for two robbery counts, abduction and two

* * *

[35] A Christopher Allen Crissel.

Q Are you employed, Mr. Crissel?

A Yes, sir, I am self employed.

Q Directing your attention to August 29, 1992, were you employed at that time?

A Self employed, sir.

Q And were you working on that day?

A Yes, sir.

Q Where would that have been?

A Bragg Towers at 99 South Bragg Street, Alexandria, Virginia.

Q What kind of a facility is Bragg Towers?

A It's an apartment-hotel, sir.

Q Did there come a time on that day when something unusual occurred?

A Yes, sir. At about 3:45 in the afternoon I was working on the company's computer, trying to do something with the reservation system, when two black males came to the right front door of the building. We have a left front door and a right front door, attempting to get in.

We have a security system of some sort where we have to release the door, the lock, to let somebody in [36] and the right door does not provide that. So it immediately let me know that the gentlemen were not aware of that and I pointed them over to the left door.

At that point they came to the left door. At that time in the afternoon we generally let people in freely without question. We do have a speaker. So I released the door and they came in.

Q Would you tell His Honor and the Jury what occurred next?

A At that point, the gentlemen, the Defendant, I guess you want me to point him out, came to the front counter. We have a front counter and we have a side counter. It sort of goes like an L, okay.

Came to me and asked me if I had any efficiency apartments for rent. At that point, I was a little leery of the fact that – that something just didn't – just went here to my heart (Indicating), something felt funny about the whole thing, but I fumbled around trying to act like I was looking to see if we had something available.

As I turned my head to the right back to him – I had gone to the left – the desk was this way (Indicating) and I sort of opened the draw [sic] looking for a [37] card of some sort that usually tells us what's available, what's not available. When I turned back there was a gun pointed in my face.

Q Who was holding that gun?

A The Defendant.

Q Would you point him out please?

A The man right there with the tie. (Indicating)

Q The man in the white shirt?

A Yes, sir.

Q Could you describe the gun he had?

A It was – and I can recognize – I can remember that gun as clear as yesterday. It was a smaller gun and it looked to be a .38. I do own a .38 myself, so therefore I feel that I can probably say that was a .38, but he did cover it up as well.

Q What color was it?

A It was black, sir.

Q Would you tell His Honor and the Jury what happened then?

A At that point, he basically said – I can't remember word for word at this point. It was basically give me – I want the money, this is a holdup – something like that. He was referring – at that point he was [38] holding me up, that point.

At that point I realized that he seemed to be very calm, very cool, very collected about this thing. I realized that this was, at least in my opinion, this was not something that he was doing for the first time and that he meant business.

I immediately probably reacted pretty quick to this by getting up from my desk and as I'm sitting here and from this side (Indicating) – okay, my desk would be like this (Indicating). I have to turn right to talk to him, okay.

I had to get up and turn my back basically to him for a short period of time to go to a back room that we have. A small little back room where we do keep our money. It's an open area.

As I got up, I went over that way and then there's a little door right here (Indicating) at the far end that people can enter one way or the other. It's a little latch that you just push.

I probably went a little fit faster than he wanted me to because he immediately followed me as fast as he

could around to that little door and at that point we met face to face basically as I was getting to the door to [39] release it and let him in.

He cold cocked me and hit me in the jaw.

Q Hit you with his hands? Hit you with –

A It was his fist. He hit he as hard as he could, with a lot of impact. Did not knock me down and at that point he made a comment and I gave him his money.

Q What was the comment he made?

A The comment he made, this is hard for me to say, so I might fumble around with it a little bit, but I do know word for word. He said, "Give me the fucking money or I'll blow your head off."

Q What did you do then?

A At that point I immediately went to the desk that was near by and I opened up the top draw [sic] where we keep our money. Fortunately, I was violating probably all our company's principles. We usually have the door locked, I had not locked it. I had not made a drop that day, neither one of those. I was able to give him the money with quite ease, without having to do a lot of things.

Q Approximately how much money did you give him?

A It was over $500, sir. A lot of that money was ones, so it looked like a lot more than even $500 at [40] the time.

Q Tell us what happened next.

A At that point, he seemed to be pretty pleased with the take. At least I thought so, because I was – I felt up to this point that the end was near.

He – then at that point, he stopped for a second and it seemed like he was thinking what to do with me. He wasn't sure what he was going to do with me. At least that was my feeling. Once again, that's just my feeling.

Then he said turn around and at that point I had to decide whether I was going to turn around, because I've always said that I could never take a bullet in the back of the head and I wasn't sure what I was going to do.

He put his hand on my shoulder because I was not reacting fast enough, pulled me around where I was facing against him and then at that point he took his gun and hit me as hard as he could across the back of the head.

Q What happened next?

A I just went immediately down to the ground and stayed put until he left.

Q I want to show you these photos, Mr. Crissel,

* * *

[44] occupation.

A Noel Edward Hanrahan, I'm employed with Arlington County Police Department as a homicide and robbery investigator.

Q How long have you been a police officer?

A Been a police officer almost fifteen years, detective for nine, in the homicide and robbery unit for seven.

Q Directing you [sic] attention to August 30th, 1992, did you become involved in the investigation into the shooting of a man named Emmanuel Selassie?

A Yes, sir, I did. I was the lead investigator in the cab driver's shooting and robbery.

Q When did you first become involved in the case?

Approximately ninety minutes after Mr. Selassie had been found. I was notified at home and responded in to the scene.

Q And where did that take place?

A It took place behind the Dolly Madison apartments which is right at the edge of Gleve Road and 24th Road in south Arlington, Virginia.

Q Where is that with relation to 395, Shirley [45] Highway?

A 395 runs parallel to Dolly Madison and then there's a pedestrian tunnel under the highway that leads to National Orthopedic Hospital.

Q Would you tell His Honor and the Jury what you found when you arrived at the scene?

A Once at the scene, behind the rear parking lot of the Dolly Madison towers, it had been secured. Mr. Selassie had been air lifted, medivaced, to Washington Medstar Hospital. There were other police officers and a few other detectives there canvassing for witnesses and starting the crime scene search for evidence.

There was a Silver taxi cab that belonged to Mr. Selassie parked behind this building. The doors were

opened and the interior, specifically the front passenger area was blood spattered and smeared, a very – a good deal of blood spillage there.

Q Investigator Hanrahan, I want to show you these three photographs that are marked Commonwealth's Exhibit Number 3C, 3D and 3E and ask do you recognize those?

[46] (The photographs referred to above were marked Commonwealth's Exhibit Nos. 3C, 3D and 3E, for identification.)

(Mr. Horan handed photographs to the witness for his examination.)

A Yes, sir. Commonwealth's Exhibits 3C, 3D and 3E depict the taxi cab that belongs to Mr. Selassie that was parked here on August 30th, 1992 and the condition of the car as when we found it and these pictures were being taken while I was there.

Q Do they accurately reflect the scene as you saw it on that day?

A Yes, sir, accurately reflect the scene.

Q How about this photograph, Commonwealth's Exhibit Number 3F?

(The photograph referred to above was marked Commonwealth's Exhibit No. 3F, for identification.)

(Mr. Horan handed a photograph to the witness for his examination.)

A Commonwealth's Exhibit Number 3F shows the entrance way to the pedestrian tunnel that would be [47]

leading under 395 in the direction to the National Orthopedic Hospital. The taxi cab pictures of where it was located is approximately fifteen yards from this entrance way.

MR. HORAN: Your Honor, I would offer these into evidence as Commonwealth's Exhibit Numbers 3C through 3F.

THE COURT: All right, give them to the Clerk.

MR. PIOTROWSKI: No objection, Your Honor.

(The photographs heretofore marked Commonwealth's Exhibit Number 3C, 3D, 3E and 3F for identification were received in evidence.)

BY MR. HORAN:

Q Now, on that day did you make any search of the automobile for bullets or anything like that?

A Yes, sir. The crime scene technicians at the scene that day initially looked for signs of shell casings or bullet paths and were unable to locate any evidence at the scene that day.

Q What was done with that vehicle?

The vehicle was impounded and taken by a flat bed truck to the Arlington County Police Property Yard in [48] south Arlington, where it was placed in a secured lot.

Q Investigator Hanrahan, I want to show you these photographs that are marked Commonwealth's Exhibit Numbers 3G and 3H and ask can you identify the man in those photographs?

(The photographs referred to above were marked Commonwealth's Exhibit Nos. 3G and 3H, for identification.)

(Mr. Horan handed photographs to the witness for his examination.)

A Yes, sir. These are photographs of Mr. Emmanuel Selassie as he was on August 30th over at the Washington Medstar Center in Washington, D.C. These were taken within an hour of the shooting.

Q And where is he at the time those pictures are being taken?

A He is in the Medstar Unit, the treatment-trauma center and he's on a hospital gurney.

Q That's a gurney that he's lying on?

A Yes.

Q Did you have a chance to look at the wounds he suffered?

[49] A Initially, no, sir. I could see where they were, but I was not allowed to get close to them and by that time they were adding compresses and doing surgical procedures to stop the bleeding and what have you.

Q The wounds you could see –

MR. PIOTROWSKI: Objection, Your Honor. That's a leading question. The question was that he didn't see them.

THE COURT: The question was leading. Objection is sustained.

MR. HORAN: I have no further questions on this issue, Your Honor. I would offer these as 3G and 3H.

THE COURT: All right, any objections to these?

MR. PIOTROWSKI: Your Honor, I would object to their admission at this time, subject to connection with the Defendant.

THE COURT: Objection is overruled.

(The photographs heretofore marked Commonwealth's Exhibit Nos. 3G and 3H for identification were received in evidence.)

[50] BY MR. HORAN:

Q Now, how long, if you know, did Mr. Selassie remain in the hospital?

A Approximately twenty days. He was ICU for over – about seven or eight of those days and then switched to the Ear, Nose and Throat Unit because of the massive damage on the inside of his jaw area.

MR. PIOTROWSKI: Objection, Your Honor. He's stating the reasons that are medical reasons and not within his knowledge.

THE COURT: Objection is sustained.

BY MR. HORAN:

Q Did there come a time when you conducted another search of the automobile?

A Yes, sir. I was not able to communicate with Mr. Selassie until – thoroughly until September 16th. I had visited him three times in the hospital –

MR. PIOTROWSKI: Your Honor, I'm going to object. The question was – it's non responsive and pertaining to the vehicle.

THE COURT: Objection is sustained.

BY MR. HORAN:

Q Did there come a time when you searched the [51] vehicle?

A Yes, sir, on September 16th of '92.

Q Is there some reason you didn't search it until then?

A Yes, sir.

Q And what was that?

A I did not have as clear an understanding of the events that took place that day.

Q And what finally gave you a clear understanding of the events?

A I had an interview with Mr. Selassie at the hospital where he was able to –

MR. PIOTROWSKI: Objection as to what he did, Your Honor.

MR. HORAN: I don't want what he said.

MR. PIOTROWSKI: What he said, excuse me.

BY MR. HORAN:

Q I don't want what he said.

A Mr. Selassie told me how he was sitted – seated behind he [sic] steering wheel and was facing towards the

window when he was shot in the head and I went back to the car to check out a different angle of perception that I had at that time and I recovered a bullet from under the [52] seat of the taxi cab in the rear.

Q I want to show you these that are marked 3I, 3J and 3K and ask you would you tell us what those photographs represent?

(The photographs referred to above were marked Commonwealth's Exhibit Nos. 3I, 3J and 3K, for identification.)

(Mr. Horan handed photographs to the witness for his examination.)

A Okay, Commonwealth's Exhibit 3I depicts the Silver Cab number 16, which is Mr. Selassie's vehicle, which is parked inside a fenced lot compound at the Arlington County Police Property area.

Commonwealth's Exhibits 3K depicts the rear seat area passenger side of the taxi cab. I had pulled out the bottom seat bench of the seat to inspect underneath it and Commonwealth's Exhibits Number 3J depicts a spent bullet that I found underneath the seat and it appeared to be a .9 millimeter caliber.

Q How about 3L?

[53] (The photograph referred to above was marked Commonwealth's Exhibit No. 3L, for identification.)

(Mr. Horan handed a photograph to the witness for his examination.)

A 3L, Commonwealth's Exhibit 3L is a close up to scale of the same bullet with the police agent's ruler adjacent to it.

MR. HORAN: Your Honor, I would offer these photographs into evidence as Commonwealth's 3I through 3L.

MR. PIOTROWSKI: May I examine those, Mr. Horan?

(Mr. Horan handed photographs to Mr. Piotrowski for his examination.)

MR. HORAN: Your Honor, I would offer those as Commonwealths 3I through 3L.

MR. PIOTROWSKI: No objection, Your Honor.

THE COURT: All right.

(The photographs heretofore marked Commonwealth's Exhibit Nos. 3I, 3J, 3K and 3L for identification were received in evidence.)

[54] BY MR. HORAN:

Q Investigator Hanrahan, did you thoroughly search that car at that time?

A Yes, sir. I climbed inside of it myself and I shook and I pulled out and I was determined to search as much of that vehicle as I could find.

Q Have you ever found any other bullets in connection with the shooting of Mr. Selassie?

A No, sir. There was no other indication of more than one shot being fired and there was no shell casing found at the scene.

Q Were any other bullets found in the automobile other than that one?

A No, sir, that was the only one.

Q What was done with that bullet once you found it? The one shown in 3L?

A It was collected by Agent Sarafinas, turned into the police property section. I then signed it out shortly thereafterwards and took it out to the Northern Virginia Forensic Lab in Fairfax and turned it over for ballistic comparison.

Q Who did you give it to?

A To Jay Mason.

[55] Q Is Jay Mason a ballistics examiner?

A Yes, sir.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Mr. Piotrowski?

MR. PIOTROWSKI: No questions of this witness, Your Honor.

THE COURT: Thank you, Mr. Hanrahan. You may step down, sir.

(Witness stood aside.)

MR. HORAN: Officer Sarafinas please.

Whereupon

OFFICER JOHN C. SARAFINAS

a witness, was called for examination by counsel on behalf of the Commonwealth and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name please and your occupation.

A John C. Sarafinas, police officer, Arlington County, Virginia.

Q How long have you been a police officer?

[56] A Next month will be twenty three years.

Q What are your present duties with the Arlington County Police Department?

A I'm a master police officer, senior crime scene analyst.

Q Did there come a time when you examined a Silver Cab in the police lot in Arlington County?

A Yes, sir.

Q I'm going to show you this photograph that's marked Commonwealth's Exhibit Number 3I and ask you if you can identify that vehicle?

(Mr. Horan handed a photograph to the Witness for his examination.)

A Yes, Silver Cab Number 16, Detective Hanrahan called me down to the police impound lot September 16th, 1992.

Q Did you remove anything from that cab?

A I did.

Q What was that?

A A copper jacketed bullet.

Q I'm going to show you this photograph marked 3L in evidence and ask if you recognize that?

(Mr. Horan handed a photograph to the witness [57] for his examination.)

A Yes, sir, I do.

Q Did you in fact remove that from the vehicle?

A Yes, sir, I did.

Q Have you got it with you today?

A I do.

Q Would you show it to us please?

(The witness handed a container to Mr. Horan for his examination.)

What did you do with this bullet after you removed it from the vehicle?

A Once I recovered it from the cab I packaged it as it is right now and turned it into the property section of the Arlington Police Department.

Q What is the property section of the Police Department?

A That's where we store all our evidence.

Q Is that in a secure area of the Police Department?

A Yes, it is, it's alarmed, locked and it's located in the basement of the Police Department.

MR. HORAN: Your Honor, I would offer this into evidence as Commonwealth's Exhibit Number 3M.

(The container referred to above was marked Commonwealth's Exhibit No. 3M, for identification.)

THE COURT: All right.

(The container heretofore marked Commonwealth's Exhibit No. 3M for identification was received in evidence.)

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Questions?

MR. PIOTROWSKI: No questions of this witness, Your Honor.

THE COURT: All right, thank you Mr. Sarafinas. You may step down.

(Witness stood aside.)

MR. HORAN: Your Honor, I wondered, could those photographs be published to the Jury at this time?

MR. PIOTROWSKI: Your Honor, I'd object to publication at this time. I still don't think there's been a connection made.

THE COURT: Let me be sure which ones you're referring to please, Mr. Horan? You're referring to all [59] of them that have been entered?

MR. HORAN: Yes, Your Honor.

THE COURT: And You're objecting to them?

MR. PIOTROWSKI: Yes, Your Honor. Not all the pictures have been shown to be connected to the Defendant at this point in the proceedings.

I do not believe there's been a foundation laid for any of the pictures beyond the 2s.

MR. HORAN: Your Honor, let me call the next witness.

THE COURT: I was going to say, I think Commonwealth's Exhibits 3A and 3B can be published to the Jury at this time.

(Whereupon, Commonwealth's Exhibits Number 3A and 3B were published to the Jury.)

MR. HORAN: Your Honor, I would call Shane Singh.

[60] Whereupon

SHANE KEVIN SINGH

a witness, was called for examination by counsel on behalf of the Commonwealth and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name please for the record.

A Shane Kevin Singh.

Q Mr. Singh, keep your voice up so that the Jurors can hear you, would you please.

Directing your attention to the early evening hours of August 30th, 1992, did you have occasion to be in Arlington with Eddie O'Connor and the Defendant, Bobbie Lee Ramdass?

A Yeah.

Q Was there anyone else with you?

A Theo, I don't know he last –

Q Who is Theo?

A A friend. I don't know his last name.

Q What was the reason for your going there?

A To rob a hotel.

Q What hotel were you going to rob?

[61] A I don't know the name of it.

Q When you got there where did you go?

A We parked on the street and went through a tunnel, some sort of tunnel. Came out in a parking lot. I guess the parking lot was behind the hotel, I'm not sure. On our way to the hotel we saw the cab driver sitting in the parking lot and decided to rob the cab driver.

Q Where any of you armed?

A Yeah.

Q Who was armed?

A Bobbie Ramdass.

Q What kind of weapon?

A A .38.

Q The same .38 that you testified about the other day?

A Yes.

Q Tell His Honor and the Jury what happened.

A We went back to rob the guy, me and Bob went to the passenger side. Eddie O'Connor – both me and Bob went to the driver side. Eddie O'Connor went to the passenger side and got in.

I told the cab driver to give us the money. [62] He gave us the money. After he gave us the money, Bob said that wasn't all the money and he clicked the gun, pulled the trigger and it didn't go off. Pulled it again and it went off.

Q Did you see where he shot him?

A In the neck.

Q What did you do then?

A I ran. Ran back through the tunnel.

Q How much money did he get?

A Maybe $50.00.

Q All totalled?

A Yes.

Q Did you see what happened to the cab driver after he shot him?

A Like I ran, I didn't see it.

Q You ever ask Bobbie why he shot him?

A No, I didn't.

Q Did you even care?

A Yeah, I –

MR. PIOTROWSKI: I'm going to object, Your Honor. That's a characterization of the Defendant's feelings.

THE COURT: You're asking whether he cared?

[63] MR. HORAN: I asked him if he cared.

THE COURT: A pretty simple question. Yes or no.

THE WITNESS: Yeah. I was scared. I didn't know, I didn't – I didn't ask him.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Mr. Piotrowski?

CROSS-EXAMINATION

BY MR. PIOTROWSKI:

Q Mr. Singh, how many weapons were there that day?

A Just one.

Q Which one was that?

A A .38.

Q Where was the gold platted [sic] gun?

A I don't know where it was.

Q Had you been drinking that day?

A I don't think so, might have.

Q Been smoking that day?

A I don't think so.

Q No bloods?

A I don't think.

* * *

[70] Whereupon

EMMANUEL SELASSIE

a witness, was called for examination by counsel on behalf of the Commonwealth and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name please?

A Emmanuel G. Selassie.

Q Mr. Selassie, you're going to have to move right up in your seat, because all these people over here have to hear you, so keep your voice up; would you please?

(The witness complied with the request.)

Would you tell us your full name?

A Emmanuel Gilbert Selassie. Emmanuel G. Selassie.

Q How old you are?

A I'm forty one now.

Q Where were you born?

A Ethiopia.

Q How long have you lived in this country?

A Close to twenty two years.

Q Directing your attention to August 30th of [71] 1992, where were you living at that time?

A At Dolly Madison apartments.

Q Where is that located?

A It's 2300 South 24th Road, Arlington, Virginia.

Q Did you have a job at that time?

A Yes.

Q What was your occupation?

A I drive a taxi.

Q For how long have you been driving a cab?

A Over fifteen years.

Q And did you drive a cab that day?

A Yes, I did.

Q Did there come a time when you went home?

A Yes, I came home from work.

Q About what time was that?

A About – approximately about 5:00 or a little after 5:00.

Q Would you tell us where you went when you got home?

A I went to the parking lot in the back of the building.

Q Where is that parking lot with relation to [72] 395?

A If you come from Washington, you make a right on Glebe Road and you take 24th Road and you go straight all the way down and when the street ends you make a right and you go around the building. There's just like a fenced area over there and there are parking lots.

Q Can you see 395 from the parking lot?

A Yeah, you can see it from the top, yeah.

Q Can you get to the other side of 395 without going back on the roads?

A In your car, no.

Q No, I'm talking about walking?

A Walking, yes, because they have a gate – a little door I mean in the fence. I never walked through it but people come in and out.

Q Is there a tunnel around there?

A They say there is.

Q You've never been in the tunnel?

A I've never been in the tunnel.

Q Now tell us what happened when you parked your car?

A I came from work and parked the car and I was going to close my door and I was stretching to hit it and [73] close it and three guys run to me and one of them came up my side, two of them stayed here (Indicating) and they started opening the door and when I turn around the other guy had a gun right here. (Indicating)

Q What guy had the gun?

A I don't know, one of them had it.

Q Where was he with relation to you, the guy with the gun?

A Right next to me.

Q Now are you in the driver's seat or the passenger seat?

A Driver's seat.

Q And as you were sitting in the driver's seat, was he or you right or on your left?

A On this side, on the left side. (Indicating)

Q Is he inside or outside the car?

A Who, he?

Q Yes, the man with the gun?

A I didn't see the man with the gun because he put the gun right on me so I couldn't turn.

Q So you couldn't see him?

A I couldn't see him. When I turned around I saw the gun and he told me – he asked me for money.

[74] Q He asked you for money?

A yeah, he says to me give me your money, give me your money.

Q So what did you do?

A When I hear that then I said – when I saw the gun I was shocked and I said take it easy, pal. I'll give you the money. I took my money out and just passed it. He had the gun close to me and he took the money and I just waited that he would go.

I thought he would go, but the other guys walked out and run, and I said this is the last money, this is all the money I have and that's it, that's what I said and then he shot me.

Q Where did he shoot you?

A Right here. (Indicating)

Q Prior to that did you have any scars at all?

A No scars, no scars, no.

Q And do you have scars on your face now?

A Yes, I have scars here (Indicating) and I take this over here. (indicating)

Q After he shot you, do you remember what happened next?

A Nothing, complete, never discover.

[75] Q How many days is it before you know anything?

A Almost two weeks.

Q Where were you when you –

A When I was in the hospital, I didn't even know if I was in the hospital, you know. When I open my eyes the first time, I thought I was somewhere else. I couldn't understand where I was.

Q Where were you?

A Actually, I was in the hospital.

Q How long did you stay in the hospital all together?

A I think about nineteen days, nineteen or twenty.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Cross examine?

MR. PIOTROWSKI: I have no questions of this witness, Your Honor.

THE COURT: Thank you, Mr. Selassie, you may step down please.

(Witness stood aside.)

MR. HORAN: Your Honor, I would ask that these pictures now be published to the Jury.

* * *

[85] Q And in what office do you work?

A Fairfax County.

Q Do you know the Defendant, Bobbie Lee Ramdass?

A Yes, sir, I do.

Q Has he been a parolee of yours?

A Yes, sir.

Q Do you know when was the last time he was paroled?

A He was released on mandatory parole on –

MR. PIOTROWSKI: Your Honor, non responsive. He's not answering the question, he's [sic] was looking for an answer.

THE WITNESS: On May 21st, 1992.

THE COURT: There's an objection. The objection's overruled.

BY MR. HORAN:

Q May 21st, 1992?

A Yes, sir.

Q And to which office as he paroled?

A He was paroled to the Fairfax County office.

Q Did there come a time when you discussed his parole with him?

A Yes, I did. I met with him on August 12th. [86] He was reassigned to me from another officer, Carolyn Hook.

Q Is there some reason he was reassigned from Carolyn Hook to you?

A She had resigned from her office.

Q As of September of 1992, was he still in the parole status?

A Yes, sir.

Q And through the month of August?

A Yes, sir.

MR. HORAN: I have no further questions, Your Honor.

MR. PIOTROWSKI: No, questions, Your Honor.

THE COURT: Thank you, Mr. Preston.

(Witness stood aside.)

MR. HORAN: Your Honor, please, that's the Commonwealth's evidence.

THE COURT: Let's take a recess at this time, ladies and gentlemen.

(Brief recess.)

MR. PIOTROWSKI: Your Honor, I asked when you commenced that I could present a motion to you at this time.

* * *

[91] you for it and I ask you to keep it up at this point.

There's a lot of evidence to go. There's a lot of things yet to be resolved.

The evidence that we're about to present will show you that Bobbie Lee Ramdass is now twenty one years old. He turned twenty one in October of 1992. He was twenty at the time that he committed this offense. He was fifteen when he first had his encounters with the Juvenile Court that you heard about earlier this morning.

He's impulsive, a high energy level, is associated with antisocial groups. He focuses on maintaining peer and family acceptance. Those are his goals in life. Loyalty may be his strongest trait. Loyalty to his family and his peers.

He was born and raised in what modern terms can be described as an unbelievably dysfunctional family. He has been violently abused by others and obviously he has abused others.

Although an unbelievable dysfunctional family, in modern terminology, historically he could be considered one of Fagan's children from Dicken's [sic] London. That's what our evidence will show.

His school history is erratic, minimal, [92] although it covers a period of years. He got to the seventh grade actually. He was physically moved into the tenth and then just sort of quit.

The evidence will indicate that he went to school. He then took the recess bus to another school. When he got to school he went to the one class before the recess bus came. He just didn't go there on.

Subsequently, he left school, road [sic] around to the other schools. Obviously associated with peers that got him into trouble. During that period of time he experimented with PCP, cocaine and marijuana.

In his relatively young life, he preferred PCP as his drug of choice. Obviously the drug of his peers. As he grew older he came down to marijuana and alcohol. Again, the choices of his peers.

Since the age of thirteen, thirteen to twenty one, he has been involved with the Juvenile court and in incarceration for approximately seven out of that twenty one years.

The evidence will show why, even if you find that Bobbie Lee Ramdass probably will commit future crimes of violence, he should not be executed. It will show you that he will serve, right now before you impose a [93] sentence, the next ninety nine years of his life in jail for the sentences that have been imposed.

It will show you that he is pending trial in Alexandria for the Fort Bragg apartment incident, robbery, for which as you've seen from all the other charges, will have

him facing at least one life sentence and another four years.

He has yet to be sentenced in the Domino Pizza robbery in Alexandria, of which he has been convicted. At least another life sentence.

Bobbie Lee Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.

But it doesn't end there. Bobbie still has to be punished for the alleged crimes that you heard about today. The shooting, violation of parole, and if these crimes are proven beyond a reasonable doubt in a Court of law, he will also be punished for them.

Your purpose here today is not to punish him for those crimes. You can't punish him for those crimes. That evidence is permissible in a very unique situation.

He hasn't been tried. He hasn't been found

* * *

[100] be physically difficult and he believed it right up until the death, until the death of Mr. Kayani.

But his [sic] is going to tell you that he didn't intend to kill Mr. Kayani. That he shot that weapon. That it went off. He did not intend to kill him. That the robbery was going on. The robbery was going on like it should. The guy was handing him the money and he shot it, the weapon.

And he's going to go back and remember some of the other pleasant experiences of his life. He'll tell you the

first thing he remembers from school is that he climbed in a sink and he got suspended for washing off his shoes in that sink.

We're going to show you the records, the evidence of where he came from, what he is. We're going to show you evidence because of his acts, because of his attitude, because of his thinking, he should be locked up. He should be locked up for the rest of his life.

We're going to show you evidence that nobody wants to die. He doesn't want to die. That he is ready to accept being locked up for the rest of his life and that he should be locked up for the rest of his life because he has dreams, he has ideas, he has hopes.

* * *

[124] Q During the course of your investigation, were you able to discover anything about Bobbie Lee's father? That's page 5.

MR. HORAN: Your Honor, I object to that, she never talked to Bobbie Lee's father, so it would necessarily be based on hearsay.

MR. ARIF: Your Honor, I'm asking if she found out – discovered anything about him. If she ever spoke with him, anything. Any information that she may have gathered from any sources and I think that is probative.

THE COURT: You already asked her which or how many family members that she spoke with and she said his mother. So, are you asking for hearsay information?

MR. ARIF: Your Honor, I'm asking if she discovered anything – let me rephrase the question.

BY MR. ARIF:

Q Did you speak with Mr. Ramdass?

A Bobbie's father?

Q Bobbie's father.

A No, I did not.

Q Did you attempt to discover where he was?

A No, I did not.

Q Is there a reason that you did not attempt to [125] discover where he was?

A I was advised that his whereabouts were unknown.

Q Do you know or had it ever been reported – do you know of your own knowledge whether Mr. Ramdass senior was AWOL from the Army?

A That was the information I had received.

Q Did you ever discuss with Bobbie or Mrs. Ramdass as to when the last time Bobbie had seen his father? I don't think that's in the report, ma'am.

A I don't recall.

MR. ARIF: If I may have a moment, Your Honor.

(Defense counsels confer.)

Thank you, Ms. Joffe, nothing further. If you'll just answer Mr. Horan's questions.

* * *

[130] A I don't recall.

Q Eventually, he was sent to South Hampton in July of 1988, after your recommendation?

A That's correct.

Q Judge Jamborsky followed your recommendation in that regard?

A Yes.

Q And gave him seven years at South Hampton?

A Yes.

Q Was he ultimately paroled?

A Yes, he was.

Q Where was he paroled from?

A I don't know.

Q Was it discretionary parole or mandatory parole?

A Mandatory parole.

Q What is the difference between discretionary parole and mandatory parole?

A Discretionary parole means the parole board has – essentially a person has served less time of their full sentence and is given parole or returned to the community to be released on supervision.

When a person is released on mandatory parole, [131] essentially they have served their sentence within the confines of the institution and in which case they will only be on supervision for a period of six months,

Q He was paroled in the middle of May of 1992?

A Yes.

Q Did he come back to your office at that time?

A Yes.

Q Did you deal with him at all at that time when he came back?

A No, I did not.

Q Some other officer was assigned to those duties?

A That's correct.

Q So you haven't talked to him at all since he's been out on parole?

A No.

MR. HORAN: Thank you, Ms. Joffe.

THE COURT: Any other questions, Mr. Arif?

MR. ARIF: Nothing.

THE COURT: Thank you, Ms. Joffe, you may step down, please.

(Witness stood aside.)

MR. PIOTROWSKI: Bailiff, would you ask for

• • •

[180] (Whereupon, at approximately 12:42 o'clock p.m., the hearing of this matter was recessed to reconvene at 2:00 o'clock p.m.)

• • •

AFTERNOON SESSION

(The Court reconvened at approximately 2:00 o'clock p.m.)

(The Defendant retook the stand.)

(Whereupon, at approximately 2:02 o'clock p.m., the Jury returned to the Courtroom and resumed their seats in the Jury Box.)

THE COURT: Mr. Horan?

CROSS-EXAMINATION

BY MR. HORAN:

Q Mr. Ramdass, as I understood your testimony this morning, on August 25, you participated in the robbery of the Pizza Hut?

[181] A Yes.

Q You were one of the gunmen in that robbery?

A Yes.

Q And in the course of that robbery you were using the same .38 revolver you used to kill Mr. Kayani?

A Yes.

Q In the course of that robbery you hit one of the clerks in the head with that gun; didn't you?

A No. He said I did but I didn't.

Q Pardon?

A He said I did but I didn't.

Q You didn't hit anybody?

A No, sir.

Q What did you do in the course of that robbery?

A I was in front of the counter and told the customers to lay down and watched everything with the gun like on the customers. The lady waitress came by and I told her to get down on the ground and she sat down on a chair though.

Q How much money did you get from that robbery?

A I don't know, I don't know the total. I don't remember.

[182] Q That was on the 25th of August?

A Yes.

Q Then on the afternoon of the 29th of August, you did the robbery of the Bragg Towers Hotel?

A Yes, I think that was the date, yes.

Q That man that testified in here this morning was the man you robbed in that robbery?

A Yes.

Q Who did that robbery with you?

A I don't want to say his name.

Q Why don't you just say his name anyway?

A You mean who did it with me?

Q Yeah.

A That's like me telling on him.

Q What don't you tell on him?

A He was my friend, I guess. Even though he testified against me, I'm not going to tell on him.

Q But there's another man that did the robbery with you?

A Yes.

Q Did he have a gun?

A No.

Q You were the gunman in that robbery?

[183] A Yes.

Q And you robbed Mr. Crissel, the man who testified here this morning?

A Is that the cab driver?

Q No.

A Is that the man who –

Q No, in the Bragg Towers.

A Oh, yes.

Q And it was Mr. Crissel who was on the witness stand here. He was the one you actually put the gun on?

A Yes.

Q And he went in the back room to get the money for you?

A Yes.

Q Is that right?

A Yes.

Q How much money did he give you altogether?

A I don't remember the total. I don't remember how much.

Q $400, $500, something like that?

A Something like that.

Q And then you hit him in the head with the gun?

A Yes.

[184] Q Now, he had given you the money?

A Yes.

Q He didn't threaten you?

A No, sir.

Q He didn't try to fight you?

A No, he didn't.

Q He was willing to turn it over?

A Yes.

Q And he did?

A Yes.

Q And then you hit him in head with the gun?

A Yes.

Q Why'd you do that?

A Because I told him – I was telling him to turn around and get him on the ground so we could leave. He hesitated, so I hit him and then I left.

Q Knocked him down; didn't you?

A Yes.

Q On that next night, August 30th, you did a robbery of the Domino's Pizza over in Alexandria?

A Yes.

Q And that's the robbery you were tried by the Jury on over there?

[185] A Yes.

Q What time of night did you do that robbery?

A I don't remember the exact time. It was night time.

Q It was late night?

A I think so.

Q Were you the gunman in that robbery?

A Yes.

Q And you actually went in and put the gun on the clerk in that store?

A Yes, from the front of the counter.

Q And he gave you the money?

A Yes.

Q Now you've testified in your trial over there under oath; didn't you?

A Yes.

Q And in the course of that trial, didn't you testify under oath that you didn't do it?

A Yes.

Q So you lied under oath?

A Yes.

Q And that one would have been the night of August 30th. That was not long after you shot the cab [186] driver in the head?

A I don't know the dates.

Q Well, if the cab driver was shot in the head on August 30th and Domino's Pizza was August 30th, you did them both the same day; didn't you?

A I think so if that's what it was, what you say, that's what it says.

Q Well, the fact of the matter is, Ramdass, you did – Mr. Ramdass, you did so many, it's hard to keep them all straight; isn't it?

A I know everything I've done, I've been in Court for.

Q Not everything?

A Yes, as far as robbing.

Q As far as robbery.

On the 7-11 on September 2nd, you testified this morning that Wilson went in first and put the gun on the customers?

A Yes.

Q He had the gold gun?

A Yes.

Q And you went in second and it was your job to get the clerk?

* * *

[200] A No, it was a moped.

Q A moped?

A Yes.

Q You got charged with that?

A Yes.

Q And you also got charged with breaking in some place?

A Yes.

Q What kind of place did you break in?

A A house.

Q What were you stealing in the house?

A A friend, me and my friend, we wanted to get the VCR and I think stereo.

Q As a result of all of that, they finally sent you away to the State. Convicted you and sent you to the State?

A Yes.

Q And you stayed in the State until they paroled you in September of 1986?

A I believe so.

Q You went down there in January of '86 and in September of '86 you were in Hanover, in Beaumont and then they let you out?

[201] A I think I got out before then, in between that time.

Q But you finally got paroled as a juvenile in '86, in September and then you got violated on parole in November?

A I believe so.

Q What did you get violated for?

A Can't remember.

Q Well, in any event, they sent you back to the State again?

A I believe so.

Q And then in November of '87 they released you on a thirty day visit to your home?

A Yes.

Q And that was out of Beaumont?

A Yes.

Q Still a juvenile facility; right?

A Yes.

Q And they released you on a thirty day visit and you never went back to Beaumont?

A That's right.

Q After thirty days you were an escapee?

A Yes.

[202] Q And you remained an escapee up until you got arrested for robbing Mr. Thompson?

A Yes.

Q The robbery of Mr. Thompson took place in February of '88 and for that robbery you got sentenced in July of '88 to South Hampton?

A Yes.

Q You went to South Hampton in July of '88 and didn't come out until May of '92?

A Yes.

Q When they mandatorily released you on parole in May of '92?

A Yes.

Q You went back to live with your mother –

A Yes.

Q – in May of '92?

A Yes.

Q How long after you got out did you get your first gun?

A I think it was right before – like right after July 4th.

Q Right after the 4th of July?

A Yes.

[203] Q And at that time you were carrying a tec 9; weren't you?

A Yes.

Q And that was tec 9 you got from Bobby Lock?

A No.

Q You didn't get that from Bobby?

A No.

Q Well, it was a tec 9?

A Yes. His name is Robby Lock

Q Pardon?

A His name is Robby Lock.

Q Robert Lock?

A Yes.

Q Is that who you got the tec 9 from?

A No.

Q But that tec 9 you carried for a couple of weeks in July?

A Yes, I believe so.

Q And on July 15th you went over into Old Town Alexandria with Julius Clark and Eddie O'Connor and Theo Sharp; isn't that right?

A In Old Town?

Q You went over to the Bird in Alexandria?

[204] A I don't think so.

Q Did you go over there early one morning looking for a guy named Dwight – Darrell Ferguson?

A I don't know no Darrell Ferguson.

Q A drug dealer?

A I don't know him.

Q Hangs out in Alexandria and hangs out on Number 1 Highway?

A I don't know. I don't know him.

Q Didn't you shoot a guy in Alexandria on July 15th, 1992?

A No.

Q With that tec 9?

A No, sir.

Q Wasn't Theo with you?

A No, sir. I don't know what you're talking about.

Q Pardon?

A I don't understand. I don't know what you're talking about.

Q You didn't doing [sic] any shootings in Alexandria that you know of?

A No, sir.

* * *

[216] MR. PIOTROWSKI: Peggy Ramdess.

Whereupon

PEGGY ANN RAMDASS

a witness, was called for examination by counsel on behalf of the Defendant and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SOLOWAY:

Q Please state your name for the Court?

A Peggy Ann Ramdass.

Q Mrs. Ramdass, do you have any children?

A Two.

Q And their names?

A Bobbie and Mark Ramdass.

Q And who is older?

A Bobbie.

Q How much older is he?

A A year.

Q Do you have any brothers and sisters?

A There's twenty one of us.

Q There's twenty one of you?

A Yes.

Q Are you originally from around here?

[217] A Born in D.C.

Q You were born in D.C.?

A (Nodding head.)

Q When did you leave home?

A I left many a time. I ran away –

Q You ran away.

A – thirteen, fourteen, fifteen.

Q And why were you running away?

MR. HORAN: Your Honor, I object on the grounds of relevance. I mean we aren't trying Mrs. Ramdass here I don't think.

THE COURT: Why was she running way [sic]?

MS. SOLOWAY: Yes, Your Honor.

THE COURT: When she was thirteen? Objection is sustained.

BY MS. SOLOWAY:

Q Mrs. Ramdass, were you sexually abused?

A When I was younger, yes.

Q When did you leave home for good?

A When I was nineteen.

Q And why?

MR. HORAN: Your Honor, I object on the grounds of relevance.

[218] MS. SOLOWAY: Your Honor –

THE COURT: Excuse me. Mrs. Ramdass, if you'd be kind enough to pull your chair right up and speak into the microphone so these ladies and gentlemen over here can hear you as well.

All right, what was your question?

MS. SOLOWAY: I asked her why she left home.

THE COURT: And you're objecting to that?

MR. HORAN: On the grounds of relevance, Your Honor

MS. SOLOWAY: Your Honor, the relevance of this will be shown.

THE COURT: Ms. Soloway, I don't know whether – when she left home, whether your client had even been born and the objection is sustained.

BY MS. SOLOWAY:

Q Who is Bobbie's father?

A Mr. Chandradath Ramdass.

Q How do you know that?

A Because we got married and that's what was on the marriage certificate.

Q Were there ever paternity tests done to show that?

A [219] No.

Q How old were you when you had Bobbie?

A Twenty two – twenty one.

Q Were you working at the time?

A Yes.

Q What were you doing?

A I was a topless dancer at a night club.

Q How long did you do that for?

A About two years.

Q Two years till Bobbie was born and you went back or you stopped for a while?

A (Nodding head.)

Q You were married to Mr. Ramdass during this time period?

A No.

Q Were you married to him later?

A I married him when I found out I was pregnant, eight months we got married.

Q Did Mr. Ramdass have any relationship with Bobbie?

A Not really, no. He never believed Bobbie was his son.

Q Did he ever do anything to harm Bobbie?

[220] A He would beat him with a belt constantly when he, you know, when I wasn't there mostly.

Q How about your other son?

A Mark? No, he adored Mark.

Q He never did anything to hurt Mark?

A No, nothing.

Q Mrs. Ramdass, have your parents ever met Bobbie?

A Yes.

Q When he was little what was their reaction to him?

A My father would always say here come the niger lovers. Every time we would come he would say that, even to my sons.

Q Were your sons old enough to understand it?

A Yes.

Q What do you do for a living now?

A I'm a assistant housekeeper at the Comfort Inn on Richmond Highway.

Q Have you held a lot of jobs in the past?

A Not many.

Q Not many? How did you get by?

A Many things I used to do.

[221] Q Such as?

A Steal and write bad checks and when my husband left me, we stayed in a storage bin and we didn't have no where to live, you know when they had like free food samples and stuff?

Q Yes.

A We went around and took those to eat until I could get food from social services.

Q Did you ever pretend you were collecting money for charity?

A Not me, no but Bobbie and Mark did.

Q Did you ever take the children with you when you went to steal things?

A Grocery store, yes.

Q What did you do?

A I would stand them up in the basket and I would have my bag right there and I would stuff it up with food and then just walk out the store.

Q How old were the kids at this time?

A Maybe six, seven.

Q You said you lived in a storage bin. What do you mean by a storage bin?

A Well, see I used to live in Shirley Duke, [222] right on Duke Street and they had stuff where you stored your furniture and we stayed in there for forty five days.

Q What time of year was this?

A During the summer time I think. We did have a neighbor upstairs that would let us bathe.

Q When you went to work, who took care of Bobbie and his brother?

A Well, when I started back to work, then I would leave them with different people and then afterwards – no one permanently.

Q Did there ever come a time when Bobbie was in charge of his brother?

A Yes, he grew up before his time, yes. I know this. I had to have him to watch him constantly because my

husband was student and I had tried to go back to get my GED and everything.

Q So Bobbie was watching Mark?

A Yes.

Q How old was Bobbie at that time?

A He was young, seven, eight, nine.

Q Did he take care of Mark?

A He always watched Mark. He was very jealous of Mark, as I said, very jealous.

[223] Q Did he protect Mark?

A Always.

Q How did he do that?

A He would stay right there with him. He wouldn't leave him.

Q Did he get into fights for him?

A This I didn't see.

Q Do you know if Bobbie taught his brother anything or did he just watch him?

A He just watch him.

Q What did you teach Bobbie?

A I taught Bobbie many things. How to survive out here, how to protect his self.

Q How did you teach him to protect himself?

A I taught him how to fight, like my brothers did me.

Q And what did that consist of? Did you get into sparing [sic] matches with him? What did you do?

A I stand him up like a boxer and fight, actually fight. Just like my brothers did me to teach me how to defend myself.

Q Did you teach him when to fight?

A When – when – when anyone that would harm [224] him or hit him first. This is the first rule that my father taught me.

Q When anyone hit your [sic] first?

A Yeah, then you had the legal right to hit back because you're defending.

Q Right away?

A Yeah, the first punch.

Q Is it okay to come back later and hit somebody after they've hit you?

A You mean if they still hitting you?

Q They're hitting and they get away. Is it okay to go after them?

A Normally when I hit someone they don't come back up.

Q You said you were involved in some criminal activity, writing some bad checks and shoplifting to survive.

Have you ever been convicted of a crime?

A Just three.

Q And what were they?

A Two battery and assaults and one cashier check.

Q A bad check charge?

[225] A (Nodding head.)

Q Uttering?

A That was a felony.

Q Did you ever go to jail?

A No. I was put away for one year.

Q You were put away where?

A Reform school.

Q You were in reform school when you were a child?

A I was seventeen.

Q Was this before Bobbie was born?

A (Nodding head.)

Q Why were you put away in a reform school for?

MR. HORAN: Your Honor, I object on the grounds of relevance.

MS. SOLOWAY: I think this goes to show –

MR. HORAN: She's not being tried.

THE COURT: What were you going to say?

MS. SOLOWAY: This goes into the whole upbringing-background of Bobbie. It shows where the family is coming from.

THE COURT: But he hadn't been born at that time, Ms. Soloway. Objection is sustained.

[226] BY MS. SOLOWAY:

Q Mrs. Ramdass, did you ever lose custody of your children?

A Twice. The County took them twice.

Q Why?

A One time I was in Court for an eviction and I had left Bobbie and Mark home, Bobbie to watch Mark and while I was in Court the Sheriff had came and put everything out on the sidewalk and when I got home there was note that the County had took my sons.

Q How long did they have your children?

A About two weeks.

Q How old were your children at that time?

A They were young, maybe nine, ten.

Q Bobbie was eight or nine? That would have made Mark –

A Six or seven.

Q And the second time?

A The second time I lost everything I had. I got evicted and I was here in Alexandria and the worker talked to me into giving up my sons before they would take them from me.

Q How long was that for?

[227] A They kept them for about a year.

Q For a year?

A Yeah.

Q Were you able to visit them or anything?

A I had visitation rights on them. They would bring them to me. I could never go there to the foster parents. They would bring them to me on my day off, but they didn't stay.

Q They didn't?

A I'd spend a couple of hours, that's all.

Q That's all you were allowed?

A Uh-huh.

Q Who's Mr. Sanchez?

A The next boyfriend.

Q How old were the kids?

A At that time I'd say about eight and nine.

Q He was your boyfriend for how long?

A About two years.

Q Did he ever abuse you?

A Yes, all the time.

Q Did the children see this or –

A Yes, they tried to – Bobbie tried to break it up most of the time.

[228] Q Did he ever abuse the children?

A Yes, many a time.

Q What did that consist of?

A He would lock Bobbie in the closet. He would beat him with a belt buckle. He would hold Mark – his little legs – on the fifteenth floor, I lived on the fifteenth floor, out the window attempting to drop him.

I just couldn't take it any more. I ended up attacking him and putting him in – police and everything came about four or five times.

Q How did you attack him?

A I don't know. I snapped – I must have snapped because when I came through the door my house was tore apart. Everything was cut to ribbons with knifes, the windows were busted out, the tv, the lamps was all busted and when I came through the door something hit me.

All I remember is I was on top of him eating his stomach out, biting his stomach out. They had to take him to the ambulance and everything.

Q Were you charged for that?

A No.

Q You said you were charged for some assaults.

What were they?

* * *

[255] The Court instructs the Jury that you have convicted the Defendant of an offense which may be punished by death. You must decide whether the Defendant shall be sentenced to death or to imprisonment for life and a fine of a specific amount, but not more than $100,000.

A Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following: That after consideration of his history and background, there is a probability that he would commit [256] criminal acts of violence that would constitute a continuing, serious threat to society.

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If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, that after consideration of his history and background there is a possibility that he would commit criminal acts of violence that would constitute a continuing, serious threat society and you are unanimous, then you may fix the punishment of the Defendant at death.

Or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at imprisonment for life and a fine of a specific amount, but not more than $100,000.

If the Commonwealth has failed to prove the aggravating circumstance above, beyond a reasonable doubt, then you shall fix the punishment of the Defendant at imprisonment for life and a fine of a specific amount, but not more than $100,000.

Mr. Horan?

MR. HORAN: Thank you, Your Honor.

Thank you once again for your attention. I'll try to be brief.

Members of the Jury, it's probably fair to say [257] that there is no such thing as a good murder. They don't make good murders, just that some are worse than others. I suspect on the evidence before you that you probably feel this is as bad as any.

The legislature in recognition of the different kinds of murder than can be committed, the legislature has seen fit to have gradations of murder. Second degree murder where the maximum penalty is twenty years. First degree

murder where the maximum penalty is life imprisonment.

Then they select one category of crimes they call capital murder. This is the highest form of murder and it carries the potential of the death penalty in a proper case. It is restricted to very few crimes, as it should be, and among crimes that the legislature considers it proper is a crime where one willfully, deliberately and with premeditation kills a robbery victim.

But you'll notice that the legislature has not said that merely because it's one of these terrible crimes that the penalty must be death.

What the legislature has said is that in addition to it being one of these terrible crimes, one of these selected crimes, the legislature has said that the [258] twelve members of the Jury must also find that there is a probability that this Defendant would commit criminal acts of violence that does constitute a continuing serious threat to society. That's what the law calls future dangerousness.

The Commonwealth has the burden of satisfying you. Looking at the crime that was committed here, the history and the background of this Defendant, that it is probable that he will be dangerous in the future.

If you are satisfied to that and don't believe there is a true factor that mitigates it, then the proper punishment is death.

Members of the Jury, there are brutal crimes committed many times by people that aren't terribly brutal by nature. Murder is committed in passion, drunken brawls,

sometimes very brutal crimes but they're done by people who are basically not that kind of people.

The crimes to watch for and the people to watch for are brutal crimes committed by brutal people. We submit to you that this is one of those.

A, it's a senseless killing. B, it's the killing of a defenseless working man who was offering no threat to this Defendant.

[259] It's a funny thing about trying these kind of cases, the Jury sits there and you don't know much about victims, because to a certain extent in a murder case, the victim is – and I hate to use the word – certainly legally the victim becomes almost irrelevant.

We focus so much on the Defendant. In murder prosecution you really don't know an awful lot about the victim. In death they become pieces of paper.

A piece of paper written by the Medical Examiner. A piece of paper written by the Pathologist. Some photographs that are taken by police photographers when they look at dead bodies. We're pieces of paper in death.

In criminal trials there's a tremendous tendency to forget that what we're talking here about is the killing of an innocent man. Killing without an ounce of compassion, without an ounce of fairness. Killing of Mohammad Kayani for virtually no reason at all.

We look at the pieces of paper and we see a man on a slab and all we know is that this Defendant killed a 34 year old native of Pakistan at 1:00 o'clock in the morning at 7214 Beulah Street in Fairfax County.

We find out he's five foot nine, a hundred and [260] forty six pounds. We know the color of his eyes, the color of his hair. We don't know much about him at all because it's irrelevant.

The victim of this terrible murder is almost an after thought. We may not know much about him, members of the Jury, but it's probably fair to say this, the one thing we do know about him, is that 34 year old Mohammad Kayani simply did not deserve to die. We know that.

In the eyes of the law he's a total innocent. A working man going about his occupation, bothering no one, doing his job and slaughtered by this Defendant.

Of course at the trial phase, you just knew he killed Kayani. What you learned this morning and this afternoon, not only did he kill Kayani, but that two days before he had done almost the same thing.

He shot that forty year old Ethiopian right in the head. He shot him in the same way. He shot him in the course of an armed robbery. A man who's not doing battle with him. A man who's not challenging him. A man who is turning over the money. Until two weeks ago, he thought he had two notches in his killing belt.

We know we're dealing here with a brutal crime and we're dealing with a person for whom brutality is not [261] a one time aberration. It's a way of life. The question for you, is he a continuing serious threat to society, is it probable.

We submit to you that it is. We have here even at his age a career criminal. Starting at the age of fourteen purse snatching of a sixty five year old woman, for which he

got probation. Within months, theft of a moped. Breaking and entry of a home.

All of those together, he winds up in the juvenile home. He says there for a short period of time. In the middle of the next year he's back out. He's a probation violator, goes back to the juvenile home.

Finally in May of 1992, he's back on the streets of Fairfax County. When he finally got paroled in May of 1992, it's significant to note that this parole is for a robbery.

The first time he was tried as an adult, he was tried for robbery in 1988. He serves a little over four years total for that robbery, in May he's released.

On the evidence before you, on August 25, 1992, he robbed a Pizza Hut at the point of a gun. August 29, 1992, he robbed the Bragg Towers Hotel.

You heard the witness testify this morning, [262] robbed him at the point of a gun. Hit him in the head with the pistol at the end of the robbery. That's August 29, 1992.

August 30th, 1992, he robbed Domino's Pizza at the point of a gun in Alexandria and he robbed Domino's Pizza not long after he shot that Arlington cab driver through the head with the bullet coming out the side of his face.

And finally, he culminates his summer of dangerousness, his summer of dangerousness with the killing of Mohammed Kayani.

We submit to you members of the Jury, he is the epitome of dangerousness. He is a proven serious threat to society. The best indicator of future behavior is past behavior and he does it in spades.

It's rather interesting to look at the evidence as it was before you yesterday and the evidence as it is before you today and note one truly sinister element.

Shane Singh testified before you yesterday and he testified again this morning. When he finished testifying yesterday, part of the challenge of the Defense was you can't believe this guy, he's a con. He entered [263] into a plea agreement. He's a thief, don't believe him.

We find out today, that everything he said, with one exception, was quite true and that one exception is the most sinister part of this whole case.

Recall Shane Singh testify that before he shot Kayani, as he knelt there on the floor next to him with that .38 caliber revolver that doesn't shoot the .9 millimeter bullets very well, he tried to fire and he clicked the gun. It didn't go off, he pulled it again and he killed him with the second one.

Shane Singh testified this morning that when he tried to kill the cab driver, he clicked it once and it was the second pulling of the trigger that put the bullet through the cab driver's head.

You wonder, who do you believe. They were telling you yesterday don't believe Singh. Members of the Jury, it's obvious he's telling the truth and he certainly is collaborated by the two other victims in the 7-11. Both of whom testified that someone stood in the doorway of the

7-11 and clicked the weapon four or five times while they lay there on the floor.

Who do you think stood there and clicked that weapon four or five times toward those victims as they lay [264] on the floor.

I submit to you on this evidence of fair inference, it was this Defendant. He was perfectly willing to kill them too.

What's the first thing he said when he got into the automobile? He says to Wilson, "Why didn't you kill the rest of them?"

Remember Ramirez telling you Wilson said, "Man, we don't have to do that." No, they don't. But he does, because he's different. He's got a streak of violence and dangerousness in him that the law worries about. That's why the law says that if you find there's a probability that he'll commit serious acts of violence in the future, that you can penalize him with the penalty of death.

It is fortunate, members of the Jury, that there are few cases that come to that, because it's a very difficult chore for any one to ask for it or to decide it. Some cases ask for it. We submit to you this is a one of them. This particular Defendant constitutes, has in the past, will in the future, constitute a serious continuing threat because of his propensity for violence.

I ask you for the death penalty.

* * *

[268] us.

There are many sides to Bobbie Ramdass. You saw Bobbie crying in Court today. A man that Mr. Horan says has no conscience, has no remorse, has no feelings.

I submit to you that is not an animal. That is a human being. Perhaps a follower that has gone astray. A sheep that has left the flock.

If you believe that Bobbie Lee's a wild, crazed animal, then society must do something. I agree with you, they must. We must.

But I submit a wild animal removed from its environment is not merely destroyed. We cage it. We put it away for life and that is what you should do.

Why should we give Bobbie Ramdass the benefit of life when Mohammed Kayani was denied that?

That is a very difficult question to answer. Let's look at what makes Bobbie Ramdass up. His mother testified, "I taught Bobbie how to fight." That she stood him up like a boxer and punched him to teach him how to fight. To teach him how to take a punch. And what was Mama's credo? Don't throw the first punch, because if you're in Court then they can't say you threw the first punch.

* * *

[273] really just don't give a damn.

Today I am asking you to give a damn. I'm begging you to give a damn. I'm begging you to save a life. You have in your hands the opportunity to recognize that a human being has been saved. That a human being has been salvaged.

I'm begging you, regardless of your position, whether you believe an eye for an eye, this is the time that you can recognize your humanity. That you can recognize that a salvation has taken place. That there has been change. That there is some good in very [sic] one of us, whether it be me or Mr. Horan or anyone. There is good.

You saw Bobbie Lee stand there and tell you when he speaks of his brother, "He is my heart." That's good. There is good in that.

Bobbie Lee is going to jail for the rest of his life. The numbers of been run by you, ninety nine plus years. There are cases in Court, matters still outstanding.

How much does society need to exact? I agree he should be put away for them. He should never see the light of day. But to take another human life, that's not [274] right.

It is most ironic that as we have sat here today, over the past few days, they are burying Thurgood Marshall. One of the chief advocates against the death penalty.

I know your position. But I ask you to open your eyes. I ask you not to sentence Bobbie Lee to death. I ask you to find the miracle and see it as I do, as my co-counsel does.

I ask you to give him life. Life, he will never see the light of day, but may you not take his life.

Thank you, Ladies and gentlemen.

THE COURT: Mr. Horan.

MR. HORAN: Members of the Jury, the notion that this Defendant has found salvation seems like a very long stretch.

This Defendant on August 30th shot the cab driver in the head and believed he killed him. For six months he thought he killed him. Isn't it strange that salvation didn't set in on September 1st?

He kills Kayani on September 2nd and counsel suggests to you that salvation set in.

Members of the Jury, on September 3rd he's [275] selling a hot gun to a friend of his. A gun that he thinks has two deaths on it. He's selling it to a friend. He's putting it in the hands of someone else who may do something like this. Now does that sound like salvation?

Thank God we do not ask you to leave your common sense at the front steps of the Courthouse when you come in here.

Counsel tells you we the people of the United States are savages. We are not. There are savages among us, but the American people are not and we have a society that survives because the bulk of the American people are not savages.

When we have those in our ranks who can not possibly live by the rules of society, either here or in prison, then the death penalty becomes appropriate. Not before.

We'll leave it to you on the evidence you heard, on the history and the background and the terrible act he committed. We'll leave it to you whether salvation set in.

Counsel tells you he's a follower. He wasn't a follower when he went into Bragg Towers on August 29th. He wasn't a follower when he jumped the cab driver on [276] August 30th and he was the second man in the door with a gun on September 2nd when he killed Mohammed Kayani.

A lot of things he is, but a follower is not one of them. He's a killer. He should be punished for it.

Thank you.

THE COURT: Ladies and gentlemen, you have already selected a foreman, the verdict must be unanimous. If you will retire to the Jury Room, please.

(Whereupon, at approximately 4:20 o'clock, p.m., the Jury was excused from the Courtroom to begin consideration of the instant matter.)

(Whereupon, at approximately 6:06 o'clock, p.m., the Court reconvened.

THE COURT: Ladies and gentlemen, what I propose to do is to bring the Jury out and direct them to return tomorrow morning at 9:00 o'clock. Any objection?

MR. PIOTROWSKI: Do we have any idea, Your Honor, of any word from them?

THE COURT: Well, no we haven't heard from them and because of the hour, I assume that the need or want to go to dinner and that type of thing.

MR. HORAN: Your Honor, I wonder, could we at [277] least see if they're close? I mean if they've got any idea if they may be close to a verdict?

THE COURT: Bring them out, please.

(Whereupon, at approximately 6:07 o'clock p.m., the Jury returned to the Courtroom and resumed their seats in the Jury Box.)

THE COURT: Ladies and gentlemen, I asked the Bailiff to have you come out and tell you that you not only can, you should take as long as you need to reach a verdict, but because of the hour, in the event that you have not reached a verdict by 7:00 o'clock, you are directed to return tomorrow morning at 9:00 o'clock and resume your deliberations.

In the event that that occurs, during the overnight recess, please do not discuss the case with anyone.

If you would return to the Jury Room, please?

(Whereupon at approximately 6:08 o'clock, p.m. the Jury was excused from the Courtroom.)

(Whereupon, at approximately 7:02 o'clock, p.m., the Court reconvened.)

THE COURT: The Jury has sent out the following question which I will read for the record. I'll [278] show it to counsel and elicit any comments that you have to make.

"Question, if the Defendant is given life, is there a possibility of parole at some time before his natural death" and it's signed, I assume, by the foreman and dated January 29, 1993.

Show this to counsel, please.

Any comment, Mr. Horan.

MR. HORAN: Your Honor, I think the response is – the one right in the beginning of the models that you are to decide what a just punishment is and not to concern yourself with what happens thereafter. The Virginia Supreme Court for thirty years now, I think, has constantly said that is the answer.

THE COURT: Mr. Piotrowski?

MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.

I believe that the Court (sic) should be told that they can not concern themselves with what will occur [279] after they impose their sentence.

I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.

I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is – I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your sentence will be the legal sentence imposed in the case."

I'm open to any other suggestions.

THE COURT: The model instruction which certainly assume is the one alluded to by Mr. Horan, is instruction number 2.700, which reads as follows:

"If you find the Defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterward."

That's what the law is; isn't it, Mr. Piotrowski?

[280] MR. PIOTROWSKI: Your Honor, that's an instruction that's been given and been acceptable in the past. As we know, the Virginia Supreme Court has recently said that there is no legal presumption per se attached to the instructions in those books.

I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole, which they aren't allowed to be told about.

MR. HORAN: Your Honor, I think that very instruction has been approved by the Virginia Supreme Court in capital cases.

THE COURT: I think in both the Clark and the Hinton cases.

Bring the Jury in, please.

(Whereupon, at approximately 7:08 o'clock p.m., the Jury returned to the Courtroom and resumed their seats in the Jury Box.)

THE COURT: Ladies and gentlemen, the Court is in receipt of the question which you sent out, which for the record is:

"Question, if the Defendant is given life is [281] there a possibility of parole at some time before his natural death?"

The answer is, ladies and gentlemen, that if you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Ladies and gentlemen, you are excused for this evening. If you will return, please, at 9:00 o'clock. Again, during the overnight recess, please do not discuss the case with anyone.

(Whereupon the Jury was excused from the Courtroom.)

The Court stands adjourned.

(Whereupon, at approximately 7:09 o'clock p.m. the hearing of the above captioned matter was recessed to reconvene January 30th, 1993, at 9:00 o'clock, a.m.)

[282] CERTIFICATE OF REPORTER

I, JUDY F. HILLERY, the Verbatim Reporter who was duly sworn by to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of April, 1993.

/s/ Judy F. Hillery
JUDY F. HILLERY
Court Reporter

VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs. Criminal No. 77182

BOBBY LEE RAMDASS, (Filed May 1, 1993)

Defendant.

Circuit Courtroom
Fairfax County Courthouse
Fairfax, Virginia

Friday, April 2, 1993

The above-entitled matter came on to be heard before THE HONORABLE QUINLAN H. HANCOCK, Judge, in and for the Circuit Court of Fairfax County, Fairfax, Virginia, commencing at 3:15 o'clock p.m.

* * *

[60] officer tells us that the defendant told him that the shooting of the cab driver didn't bother him.

On page 8B, I guess, there is virtually a prophetic staff report done in 1987 by a staff psychologist who suggests that you're dealing here with a very dangerous, aggressive human being.

He hasn't changed from 1947 until now. We fully concur with the probation officer when the probation officer says on page 9A that we are dealing here with a

hard core individual who has no concern whatsoever for the life and property of others.

We would submit to Your Honor, as we submitted to that jury, that this is a case where the penalty of death is just and appropriate.

And we ask Your Honor to enter judgment in accordance with that jury's verdict.

—Thank you.

MR. PIOTROWSKI: Your Honor, the examination of the number of murders that have occurred in this country before and after the abolition of the death penalty does not support the theory that capital punishment has a unique deterrent affect.

This is a quote from Capital Punishment

* * *

[62] found guilty of capital murder.

The question we're here for today is not that he did these things, but what should the punishment be.

And our Supreme Court has consistently said that we got to examine the character of the individual. We've got to examine his background and his circumstances.

From 1974 on we're supposed to be narrowing the sentencer's discretion in this area.

According to Article 51.1 151B1 of the Code of Virginia, any person convicted of three separate felony offenses of murder, rape or robbery by presenting them a firearm, will not be eligible for parole.

In accordance with 53.1-151C of the Virginia Code, any person who receives a life sentence for a Class One felony will serve at least 25 years.

And according to 53.1151B persons sentenced to die shall not be eligible for parole.

Your Honor, now beyond any question, even though I think it was beyond any question at trial in this case, Bobby Lee Ramdass is not eligible for parole.

The pre-sentence report in this case indicates that he is convicted of robbery and sentenced to 76 years.

He is convicted of robbery on a different [63] occasion and sentenced to 18 years.

And he is convicted of a third robbery and sentenced to 14 years.

All of those with firearms.

Obviously, Your Honor, he has been convicted of murder here.

Today you have to impose a sentence for an additional robbery which at least will be one more event.

Those facts and circumstances indicate that Mr. Ramdass would never be eligible for parole. In effect, in answer the jury's question of, if Mr. Ramdass were given life in prison, would he die in jail?

The answer would be yes. He is not eligible for parole.

As you're aware, Your Honor, we attempt to contact jurors pertaining to their opinions. We have, in effect,

reached a total of six. Three were willing to talk to us. Three were not willing to talk to us.

I don't want to present the names here in the courtroom, but I will present what they said. Two men and one woman talked to us.

I think it's safe to say that three of them that [64] talked to us felt that if the answer to that question would have been, yes, and they know, they knew that he would have never gotten out of prison, they would have given him life rather than death.

Two of them expressed the opinion to us that that would have been the result among all of them beyond question, if they had had that information.

They expressed the opinion that, to the contrary, because they weren't told or given the answer that they were not to consider it, that they all had a perception that he would be paroled.

That they had a perception that parole was approximately 20 years in the State of Virginia.

The studies that have been done show that based on studies done here in Virginia, as a matter of fact, one was done in Edward County, Virginia, indicates that the average juror believes that a person sentenced to life will serve seven to ten years before parole.

And other studies indicate that the defendant sentenced to life for murder during a robbery will serve no more than ten years.

These studies are taken and quoted from the Capital Defendant in parole eligibility, an article by [65] Chrystal Straub in the Capital Defense digest in the fall of 1992.

The article also points out, as we all know, that a common question from a jury in Virginia is, will the individual remain in prison if we give him a life sentence?

As far as I know, that question has arisen in the last three cases that have been tried here in Fairfax County. It has arisen at least a dozen times since 1974 in other Virginia cases where it's been noted.

The reason and justification for not telling the jury about parole is based on two prongs here in Virginia.

Actually, and in the rest of the country where the ruling is the same.

The first prong is that if the jury knew about parole, they would have a tendency to increase the sentence to make up for what they thought was proper time.

And, therefore, the defendant would end up receiving a longer sentence, a legitimate rationale

Which in the context of a capital murder defendant, though, creates just the opposite affect because the perception is that if a person is sentenced to [66] life, he will be paroled, which defeats one of the major purposes for which they're talking about.

Once they determine the person is guilty, once they determine that the person is dangerous, they have reached a factual conclusion that they don't want him back in society.

If they knew that he was going to stay in jail, then that would permit them to exercise the mercy that is supposed to be available pursuant to the mitigating factors in cases.

The other rationale for not telling the Court about parole in Virginia is that that's an executive function, not a judicial function, and that the executive function manages the system, and the judicial function imposes the punishment.

A rationale, Your Honor, also that it is not exactly true in that the judicial function here in telling the jury about it is not trying to manage it, but just trying to provide the information to the Court.

Nobody manages the individual, nobody controls the individual once the sentence is imposed, the system still controls him.

Both rationale, again, and the fact that the [67] jury cannot be told about parole and eligibility, there are too many cases saying that your ruling was right in this case, and that they can't be told about it is accurate.

But the fact can be considered, which is why we want you to consider what information we could get to tell you what we felt the jury would do if they had known the true facts.

If they had the right and they should have the right in this case because it's denying to the jury a crucial litigating factor which we're not supposed to be doing anymore, we're supposed to be able to present under the

Constitution and under Ackey and Locket, we're supposed to be able to present to the Court all mitigating factors.

It's surely unusual and surely strange when saying that the person is going to spend the rest of their life in prison as a mitigating factor, but under these circumstances, it surely and certainly is a mitigating factor.

If we can't present it to the Court, we do the next best thing we can, Your Honor, we ask you to consider it and we ask you to consider a little bit of evidence

* * *

[69] that have impaired him, a little here, a little there, things that were not considered, things that were not done.

The history we have gone over. The depravity. The things we heard for the first time today, sleepwalking with a butcher knife at a young age.

The violence he was exposed to. The situation he was in.

Your Honor, at 1986 a staff psychologist, Juanita Hash, first interviewed the defendant, described him as an impulsive youth who was overrly [sic] concerned with seeking satisfaction from his environment, considering a young man, considering the environment he was from, that's not unusual.

He has a high energy level and becomes easily bored. Psychologists indicates that his lack of parenting has interfered with his developing a more acceptable value system.

He had identified with a more anti-social group.

This may have been the first time we officially recognize the problem but we did recognize it in 1986 at a time when he was in our system, not the first time he had been in our system.

[70] The first time was when they were evicted from Landmark, do you remember back to the trial, and social services took the kids away from their mother for a period of time because she couldn't support them or take care of them.

It was in 1986, also, that Dr. Draper described his situation as an unbelievably dysfunctional family, which has presented the worst possible role model.

He has himself been violently abused by others and has joined with his mother in attacking and robbing others.

The only time that Bobby Lee functions, and according to the psychologists and the people in prison is when he was in a structured environment where there were immediate responses to his misbehaviour [sic], he could function.

In the situation under which they lived, he could manage just the responsibility that he was given that of taking care of his brother and staying alive.

It's been six months since I and my associates have assumed this case and we were perplexed, as perplexed today what I could say to you could possibly change your mind.

* * *

[74] Your Honor, that's what we ask for in this case, we ask for an opportunity, that's all.

The man will never get out of jail. We ask for an opportunity for him to contribute somehow in his [sic] little a way as he thinks of it in telling others not to do it, or perhaps, hopefully with age and education, or maybe just as a guinea pig in the future.

But in a way that he will be able to do.

Thank you.

THE COURT: With respect to the issue raised in the memorandum that were filed yesterday, the issues raised in those pleadings, have been well settled both in the federal and the state courts adverse to the requested relief.

The motion to declare electrocution unconstitutional is denied.

The motion to declare electrocution in Virginia unconstitutional is denied.

And the request for an evidentiary hearing is denied.

MR. PIOTROWSKI: Thank you.

THE COURT: Mr. Ramdass, if you will please stand.

[75] Is there any reason why judgment should not be pronounced upon you at this time?

THE DEFENDANT: No, sir.

THE COURT: Is there anything else that you would like to say to the Court?

THE DEFENDANT: No, sir.

THE COURT: Mr. Ramdass, in connection with Count 2 of the indictment, which is the robbery count to which you plead guilty, I hereby sentence you to a term of life imprisonment.

As to Court 3 of the indictment, the use of a firearm in the commission of the murder, in accordance with the recommendation of the jury, is the judgment of the Court that you be sentenced to serve a period of four years in the penitentiary.

As to Count 1 of the indictment, the capital murder count, in accordance with the recommendation of the jury, I hereby sentence you to death and fix your execution for July the 10th, 1993.

It is my duty to advise you that with respect to Counts 1 and 3 of the indictment you have the right to appeal from the decision of the Court, in addition to the automatic review of the death sentence.

* * *

Bobby Lee RAMDASS,

v.

COMMONWEALTH of Virginia.

Record No. 930693.

Supreme Court of Virginia

Nov. 5, 1993.

Michael S. Arif, Burke (Sharon B. Soloway, Martin, Arif, DeWilde & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (Stephen D. Rosenthal, Atty. Gen., on brief), for appellee.

Present: All the Judges.

WHITING, Justice.

In September 1992, Bobby Lee Ramdass was indicted for the murder of Mohammad Z. Kayani in the commission of a robbery while armed with a deadly weapon, the robbery of Kayani, and the use of a firearm during Kayani's murder. Prior to a jury trial, Ramdass pled guilty to the robbery of Kayani and, over Ramdass's objection, the court deferred action on his guilty plea.

Thereafter, in a bifurcated trial conducted under the provisions of Code §§ 19.2-264.3 and -264.4, a jury convicted Ramdass of the capital murder of Kayani and fixed his punishment at death predicated upon a finding of "future dangerousness." The jury also convicted Ramdass of the use of a firearm in the commission of Kayani's

murder and fixed his punishment at imprisonment for four years.[1]

After the jury returned its guilty verdicts, the court found Ramdass guilty of Kayani's robbery and referred the robbery and weapon convictions to the district probation officer for a presentence investigation and report. Following the jury's verdict of death in the sentencing phase of the capital murder charge, the court referred the case to the district probation officer for "investigation and report before sentencing." Code § 19.2-264.5. Upon consideration of the probation officer's report covering all three charges, the court sentenced Ramdass to life imprisonment upon the robbery charge and imposed the sentences fixed by the jury on the remaining charges.

Ramdass is before the Court for automatic review of his death sentence, and we have consolidated that review with the appeal from his capital murder conviction. Code § 17-110.1.

FACTS

Because the Commonwealth prevailed in the trial court, we will view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the *Commonwealth*. *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980).

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[1] The jury was authorized to fix a four-year term of imprisonment for the firearm violation because it was Ramdass's second conviction for that offense. Code § 18.2-53.1.

During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7-Eleven store on Buelah Street in Fairfax County.

Accordingly, near one o'clock on the morning of September 2, the five men entered the 7-Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7-Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.

After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f – – head off."[2] Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.

Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass

[2] Another employee of the 7-Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.

When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?" After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."

Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

ISSUES PREVIOUSLY RESOLVED

Ramdass assigns a number of errors and makes arguments that have been answered in previous decisions of this Court. Ramdass does not offer sufficient reasons to justify a modification of our previously expressed views. Therefore, we will reaffirm our earlier decisions and reject Ramdass's contentions as follows:

A. The court's denial of Ramdass's request for appointment of a medical doctor and an investigator at state expense violated his Fourteenth Amendment Due Process and Equal Protection rights. Answered by *O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *Gray v. Commonwealth*, 233 Va. 313, 329-30, 356 S.E.2d 157, 166, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

B. The court's application of Code § 19.2-264.4(C) in the admission of evidence of unadjudicated criminal conduct in the sentencing phase violates the Eighth and Fourteenth Amendments of the United States Constitution. Answered by *Watkins v. Commonwealth*, 238 Va. 341, 351-52, 385 S.E.2d 50, 56-57 (1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797, 108 L.Ed.2d 798 (1990).

C. The court's admission of evidence of unadjudicated criminal conduct is unconstitutional under any circumstances because of the requirement of a "greater degree of reliability where the death sentence is imposed." Answered by *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, 507 U.S. 933, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993), and *Stockton v. Commonwealth*, 241 Va. 192, 210, 402 S.E.2d 196, 206, *cert. denied* 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

D. The court's refusal of Ramdass's proffered jury instruction that required proof of unadjudicated criminal conduct beyond a reasonable doubt violated his due process rights. Answered by *Stockton*, 241 Va. at 210, 402 S.E.2d at 206.

E. The court's denial of Ramdass's motion to declare unconstitutional the provision of Code § 53.1-233 providing for execution of prisoners by electrocution violates the prohibitions against cruel and unusual punishment contained in the United States and Virginia Constitutions. Answered by *Poyner v. Commonwealth*, Order entered in Record Number 930301 on March 10, 1993, and *Boggs v. Commonwealth*, Order entered in Record Number 900967 on July 18, 1990 (both orders rejected same arguments of unconstitutionality that used essentially same background materials relied upon by Ramdass as to execution by electrocution generally and "as carried out in Virginia's electric chair"); *Stockton v. Commonwealth*, 241 Va. at 215, 402 S.E.2d at 209-10; *Martin v. Commonwealth*, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980); *Hart v. Commonwealth*, 131 Va. 726, 743, 109 S.E. 582, 587 (1921).

ASSIGNMENTS OF ERROR WAIVED

Ramdass did not brief, and has therefore waived, Assignments of Error Numbers Seven, Seventeen, Eighteen, Nineteen, Twenty, and Twenty-four. Rule 5:27(e).

PRETRIAL MOTIONS

Motion for Bill of Particulars

Ramdass filed a motion for a bill of particulars seeking specific details of the evidence in support of the Commonwealth's case. However, the indictment described the offenses charged in conformity with the requirements of Code § 19.2-220 and, therefore, was sufficient to give Ramdass "notice of the nature and character of the offense[s] charged so he [could] make his defense." *Satcher*, 244 Va. at 231, 421 S.E.2d at 828 (quoting *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976)). Under these circumstances, the trial court did not err in denying Ramdass's motion for a bill of particulars.

Motion for Discovery of Accomplices's Polygraph Tests

Ramdass contends that the trial court erred in denying both his motion for discovery of the questions, answers, and results of his accomplices's polygraph examinations and his subsequent oral motion for the court's in camera inspection of those tests. According to Ramdass, the Commonwealth was constitutionally required to produce these tests because they may have contained "potentially exculpatory evidence."[3] We do not agree.

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[3] Ramdass concedes correctly that conclusory statements that any of these co-defendants may have been "deceptive" or "flunked" the polygraph examination are not admissible. *Robinson v. Commonwealth*, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).

Fairness to the defendant requires the Commonwealth's pretrial production of exculpatory evidence under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). And evidence that impeaches the credibility of a Commonwealth witness is exculpatory evidence. *Robinson v. Commonwealth*, 231 Va. 142, 150, 341 S.E.2d 159, 164 (1986) (citing *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985)). However, there is no general constitutional right to discovery in a criminal case, and *Brady* did not establish one. *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977)).

In order to establish that the Commonwealth has violated a defendant's *Brady* rights, the record must indicate that the undisclosed evidence was in fact exculpatory and material either to guilt or to punishment. *Lowe*, 218 Va. at 679, 239 S.E.2d at 118. Nothing in this record indicates either that the Commonwealth's Attorney has withheld exculpatory information or that the answers given by Ramdass's accomplices in their polygraph tests would be favorable to him and material to his guilt or punishment.[4] Ramdass's speculation that such statements

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[4] The Commonwealth's Attorney advised Ramdass's attorney prior to trial that the answers of O'Connor, one of his accomplices, were deceptive in that he attempted to minimize his role in the 7-Eleven incident. The Commonwealth's Attorney also informed Ramdass's attorney of three persons who allegedly would provide an alibi defense, but he also advised

might contain "potentially exculpatory evidence" imposes neither a duty of disclosure upon the Commonwealth, *id.*, nor a duty of inspection in camera by the court. *United States v. Navarro*, 737 F.2d 625, 631-32 (7th Cir.), *cert. denied*, 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984).

During oral argument, counsel for Ramdass contended that without access to the polygraph examinations the defense could not show that these records contained exculpatory evidence which was material to guilt or punishment. Although a defendant need not make an avowal of how a witness might testify in order to obtain pretrial discovery of a witness's statement to police, he should describe the events to which the witness might testify and the relevance of such matters to the crime charged in order to demonstrate its required constitutional materiality to his guilt or punishment. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 871-72, 102 S.Ct. 3440, 3448-49, 73 L.Ed.2d 1193 (1982). Ramdass's only claims of materiality are: (1) that because he was denied access to the polygraph examinations, "meaningful cross-examination" of Singh and Ramirez was "straightjacketed," and (2) that he might have been able to impeach their credibility with "any additional information gleaned through investigation of leads created by the polygraph facts." However, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United*

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that they had made inconsistent statements. We note that Ramdass did not call any of those persons as witnesses.

States v. Agurs, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

Considering Ramdass's guilty plea to Kayani's robbery and Singh's uncontradicted testimony that Ramdass shot Kayani, we conclude that Ramdass has not established the necessary constitutional materiality to require the pretrial production of the polygraph tests either for his inspection or for the court's in camera inspection. Hence, the trial court did not err in denying Ramdass's discovery motions relating to those tests.

Ramdass's Motion for Ex parte Hearing Relating to Experts

Ramdass, an indigent, maintains that the court erred in denying an ex parte hearing of his motion for the appointment of a medical doctor and a private investigator to assist in his defense.[5] Ramdass argues that because he must make "a threshold showing of the significance of the expert's testimony" to obtain such appointments, an ex parte hearing is required to avoid a disclosure of his potential defenses to the Commonwealth's Attorney. Accordingly, Ramdass argues, the court's denial of his request violated his Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, his Fourteenth Amendment right to due process,

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[5] On brief, Ramdass contends that the court erred in failing to appoint "other expert witnesses," but the transcript does not reveal that he asked for any experts other than a doctor and a private investigator. Accordingly, we do not consider this contention. Rule 5:25.

and "Article I Section 8 and 9 of the Virginia Constitution."

However, Ramdass offers no persuasive argument or authority supporting this contention. Indeed, none of the cases he cites deals with the constitutional rights he asserts in this case. Most of those cases deal with the application of a federal statute creating a right to an ex parte hearing when an indigent requests expert assistance in a federal action. 18 U.S.C. § 3006A(e) (1993).

We perceive no reason to depart from our previous holding that there is no constitutional right to such a hearing. *O'Dell,* 234 Va. at 686, 364 S.E.2d at 499. Hence, we find no merit in this assignment.

THE ROBBERY CHARGE

Before the venire entered the courtroom on the first day of trial, Ramdass pled guilty to the robbery of Kayani, offered to make a proffer of the evidence of his guilt and to waive his right to a presentence report, and moved the court to find him guilty and immediately sentence him. The Commonwealth's Attorney objected, contending that an immediate adjudication of guilt might raise an issue of Ramdass's right to assert a double jeopardy defense to the remaining charges. The court denied Ramdass's motion, deferred its adjudication of guilt and sentencing, and proceeded with the trial of the remaining charges.

After the Commonwealth rested its case in chief in the guilt phase of the trial, the court denied Ramdass's

renewed motion for an adjudication of guilt on the robbery charge. When the jury returned a guilty verdict on the capital murder and weapon charges, the court found Ramdass guilty of all three charges. Ramdass again waived his right to a presentence report and moved the court to sentence him immediately. The court denied that motion. Instead, it referred the matter to a probation officer for a presentence investigation and report pursuant to the provisions of Code § 19.2-299.

According to Ramdass, the court violated his Fifth and Fourteenth Amendment rights in denying these motions. Had there been an immediate adjudication of his guilt in Kayani's robbery during the sentencing phase, Ramdass claims that he could have established his ineligibility for parole because of his three separate convictions of armed robbery. Code § 53.1-151(B1).[6] However, we need not decide whether the court abused its discretion in deferring Ramdass's conviction, because the court had found Ramdass guilty of the robbery before the sentencing phase.

Evidence of Ramdass's parole ineligibility was inadmissible in any event. We repeatedly have held that such evidence of parole ineligibility is inadmissible in capital murder cases. *Wright v. Commonwealth,* 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993). We perceive no reason to modify our views on this issue and, therefore, we find no

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[6] As pertinent, Code § 53.1-151(B1) provides that: "Any person convicted of three separate felony offenses of . . . robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole."

violation of Ramdass's constitutional rights in delaying his adjudication of guilt.

GUILT PHASE

Limitation of Cross-Examination

[8] Ramdass contends that the court erroneously restricted his right of cross-examination in refusing to permit impeachment of Singh and Ramirez by questioning their involvement in several unadjudicated crimes. It is well settled in Virginia that a litigant's right to impeach the credibility of adverse witnesses by showing their participation in criminal conduct has been confined to questions about a conviction for a felony, perjury, and a misdemeanor involving moral turpitude. Code § 19.2-269 (felony and perjury; first enacted in 1919, Code § 4779 (1919)); *Clark v. Commonwealth*, 202 Va. 787, 790, 120 S.E.2d 270, 272 (1961) (misdemeanor involving moral turpitude). This limitation upon a defendant's impeachment rights is a reasonably necessary measure to restrict the scope of a criminal trial. As we pointed out in *Clark*, admission of unadjudicated crimes for purposes of general impeachment of a witness would "lead to confusion in directing the jury's attention to collateral matters and away from the issues of the case." *Id.* at 790, 120 S.E.2d at 273.

Nevertheless, Ramdass claims that the trial court's adherence to this settled practice violated his confrontation rights under the Sixth Amendment of the United States Constitution and Article I, § 8 of the Virginia Constitution. He cites no authority to support such an expansive application of these rights, and we have found

none. *Cf. Brown v. Commonwealth*, 246 Va. 460, ___, 437 S.E.2d 563, 564-65 (1993) (this day decided). Accordingly, we conclude that the trial court did not err in this limitation of Ramdass's cross-examination.

Next, Ramdass maintains that the trial court erred in refusing to permit him to ask Ramirez: "Did it surprise you that there were no fingerprints found [in the back room where Ramirez said he was when Ramdass shot Kayani]?" We find no abuse of the court's discretion in excluding such evidence; whether Ramirez was surprised would not be probative.

Instructions

Ramdass contends that the trial court erroneously included the emphasized language in a part of the burden of proof instruction: "The jury must limit its consideration to the evidence introduced, and you are not to go outside the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural." According to Ramdass, this emphasized language specifically precluded the jurors from using their common sense in deciding whether the Commonwealth had carried its burden of proof. We do not agree.

The language complained of must be read in the context of the sentence and of the instruction relating to the jury's duty to weigh the evidence. Among other things, that instruction specifically told the jurors that "you are entitled to use your common sense in judging any testimony." Reading the instructions as a whole, we conclude that the language complained of neither expressly nor impliedly precluded the jurors from using

their common sense in deciding whether the Commonwealth had proved its cases.

Next, Ramdass argues that the court erred in refusing his proposed finding Instruction A. Ramdass's proposed instruction included first degree murder as a lesser-included offense of the capital murder charge should the Commonwealth fail to prove that the killing was "willful, deliberate and premeditated." We find no merit in this argument.

We do not agree with Ramdass's conclusory statements that his proposed instruction provided a "clearer and more precise connection between the two crimes, which actually allows the jury to weigh the offenses against each other in a more balanced and coherent manner, and a more accurate statement of the law." The court granted separate finding instructions in essentially the same language as Ramdass's proposed instruction. One instruction dealt with capital murder and the other dealt with first degree murder. Since Ramdass's tendered instruction essentially duplicated those instructions, the court did not abuse its discretion in refusing to grant a duplicative instruction. *Eaton v. Commonwealth*, 240 Va. 236, 255, 397 S.E.2d 385, 396 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991).

Next, Ramdass complains that the court erred in failing to grant his tendered Instruction H that read:

> If a witness makes inconsistent statements at different stages of his testimony in regard to the subject matter under investigation, this does not render his testimony nugatory, and it is the

> province of the jury to pass upon such inconsistent statements and to give or withhold its assent to the truth of the particular statement.

Instead, the court granted the Commonwealth's Instruction I that read:

> If a witness makes a statement at this trial inconsistent, contradictory, conflicting or materially different from that made on other occasions, it does not render his testimony nugatory, but it is the duty of the jury to determine the truth or falsity of the statements made in this trial and not elsewhere.

We find no abuse of discretion in the trial court's refusal to grant the tendered instruction, which essentially duplicated the language of granted Instruction I.

SENTENCING PHASE

Ramdass argues that the court erred in refusing to respond to the jury's question, "[i]f the defendant is given life, is there possibility of parole at some time before his natural death?" Ramdass maintains that his parole ineligibility should have been disclosed to the jury in answer to this question. Such a response, he contends, would have aided the jury in choosing the appropriate sentence.

We repeatedly have held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence. *Wright*, 245 Va. at 197, 427 S.E.2d at 392. Ramdass advances no persuasive reason, and we perceive none, to modify our previous rulings. Accordingly, we

conclude that the court correctly refused to advise the jury about Ramdass's ineligibility for parole. We also conclude that the court, using the language suggested in *Hinton v. Commonwealth*, 219 Va. 492, 495, 247 S.E.2d 704, 706 (1978), as an appropriate response to such a question, correctly told the jury that "you should impose such sentence as you feel is just under the evidence and within the instructions of the court. You are not to concern yourselves with what may happen afterwards."

SENTENCE REVIEW

As required by Code § 17-110.1(C), we review the record to determine whether Ramdass's death sentence (1) was imposed under the influence of passion, prejudice, or any other arbitrary factor, or (2) is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Although Ramdass does not contend that the death sentence was imposed in violation of either of these factors, we have examined the records in all capital murder cases accumulated by this Court pursuant to Code § 17-110.1(E), paying particular attention to those cases in which the underlying felony was robbery and the death penalty was based solely on "future dangerousness." These cases are compiled in *Yeatts v. Commonwealth*, 242 Va. 121, 143, 410 S.E.2d 254, 267-68 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

Our review of those records, as well as the records of cases in which life imprisonment was imposed in similar cases, leads us to the conclusion that Ramdass's death sentence was neither excessive nor disproportionate to

sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. The record in this case shows that Ramdass, who was born on October 19, 1971, has been involved in criminal activity since he was 14 years old.

His first violent offense was that of "purse snatch[ing]" from an elderly woman in 1985. During the time Ramdass was on probation for that offense, he began to sell illegal drugs. Soon after, he was involved in the unauthorized use of a moped and in the statutory burglary of a dwelling with the intent to commit larceny. As a result, Ramdass was committed to state juvenile facilities in January of 1986 and was paroled in September of that year. Within three months of that release, Ramdass had violated his parole and was recommitted. He remained in custody until November of 1987, when he was released for a 30-day home visit. Ramdass was classified as an escapee when he failed to return to the state juvenile facility at the end of his home visit.

On February 20, 1988, Ramdass robbed Frederick Thompson. When the police arrested Ramdass for that offense, he was sleeping with a loaded revolver on his bedside table. Ramdass, treated as an adult for that offense, pled guilty and was sentenced to a term of seven years in the penitentiary. Ramdass was released on mandatory parole in May of 1992.

Within three months of that release, while still on parole, Ramdass again acquired a gun. Shortly thereafter, he committed six armed robberies, some accompanied by physical violence to the victims.

The first two robberies occurred on August 25, 1992, when Ramdass abducted Robina Khan, robbed Malik Hasfiz, and robbed and struck Richard Imlow in a Pizza Hut in Fairfax County. Ramdass's third robbery was that of Christopher Allen Crissel, a clerk at Bragg Towers, an apartment-hotel in Alexandria, on August 29. Crissel testified that Ramdass struck Crissel in the jaw "as hard as he could, with a lot of impact [and] said 'Give me the f -- money or I'll blow your head off.' " After Crissel gave Ramdass over $500 from a desk drawer, Ramdass hit the back of Crissel's head with his gun "as hard as he could."

Ramdass committed his fourth and fifth robberies on the same day. On August 30 at about 6:00 p.m., Ramdass robbed Emmanuel Gilbert Selassie and shot him in the head at close range. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Then, on September 2, in the present case, Ramdass robbed Kayani in Ramdass's sixth robbery in eight days; he also shot Kayani in the head at close range and caused his death.

Finally, our review of the record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

CONCLUSION

We find no error in these cases. In addition, we find no basis in the record to commute the death sentence to imprisonment for life. Accordingly, we will affirm the trial court's judgment.

Affirmed.

Bobby Lee RAMDASS, petitioner,

v.

VIRGINIA.

No. 93-8309.

Supreme Court of the United States

June 20, 1994.

Case below, 246 Va. 413, 437 S.E.2d 566.

On petition for writ of certiorari to the Supreme Court of Virginia. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 930693

BOBBY LEE RAMDASS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF APPELLANT

Leonard R. Piotrowski
Attorney at Law
6121 Capella Avenue
Burke, VA 22015
(703) 440-0813

Counsel for Appellant

Michael S. Arif
Sharon B. Soloway
MARTIN, ARIF & SOLOWAY
8996 Burke Lake Road, #200
Burke, VA 22015
(703) 323-1200

Counsel for Appellant

SIMMONS ARGUMENT

Defendants' Questions Presented numbered eight (8) Nine (9) and eleven (11) directly apply in a review under *Simmons v. South Carolina* but counsel respectfully requests that you again consider all of the issues raised in

his initial appeal to this court and he waives no issue previously raised at the trial or appellate levels.

I. THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT WAS VIOLATED BY THE REFUSAL OF THE TRIAL JUDGE TO INSTRUCT THE JURY THAT DEFENDANT WAS INELIGIBLE FOR PAROLE WHEN THE PROSECUTION RELIED UPON FUTURE DANGEROUSNESS TO JUSTIFY IMPOSITION OF THE DEATH PENALTY.

In *Simmons v. South Carolina*, 512 U.S. ___ 114 S.Ct. ___ 129 L Ed 2d 133, (1994) the Supreme Court held that where a defendants' future dangerousness is in issue and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. *Simmons*, Justice *Blackmun*, 129 L Ed. 2d at 1238 512 U.S. ___ (1994).

In Virginia, future dangerousness and/or vileness are the only conditions for imposing the death penalty and the one utilized must be found beyond a reasonable doubt. Va Code § 19.2-264.2.

In this case, the Commonwealth chose to rely upon "future dangerousness" only. The jury was thus instructed only on future dangerousness, and the jury imposed the death penalty on that basis.

Ramdass is ineligible for parole because he was convicted on 2 February, 1988, of robbery; on 22 January 1993 of robbery and use of a firearm; on 9 February 1993 of robbery, and on 18 February 1993 of armed robbery. (JA pgs. 1423, 1413, 1434, 1406). Of course, the 9 & 18 February convictions occurred after the jury findings in this

case, although the offenses occurred prior to the trial offenses. The 1988 conviction, and 22 January conviction of course were prior to this trial and Ramdass pled guilty to the robbery associated with this offense on the first day of trial. (JA pg. 234).

The applicability of Va Code § 53.1-151B.1 has not been questioned by the Commonwealth at trial or on appeal. The Commonwealth has relied upon the Virginia law as expressed by *Stamper v. Commonwealth*, 220 Va 260, 257 S.E.2d 208, (1979) *cert. denied*, 455 U.S. 972 (1980) that the jury will not receive or consider any evidence or information concerning parole.

Although the jury, during deliberation, requested information on parole, asking if Ramdass would die in prison (JA pgs. 1184.1175-1178) and counsel attempted to frame an informative instruction, the Commonwealth objected and the trial judge cut off further discussion and improperly instructed the jury that they were not to concern themselves with what occurred after trial. (JA pg. 1179). An instruction of this type does nothing to dispel the reality known to the reasonable juror that all life term defendants are eligible for parole. See *Simmons* at pg. 146.

In this case information provided by three (3) of the jurors confirms that the jury was aware that parole was a possibility (JA pp. 1668). This fact provides more evidence than was available in *Simmons*, ie. a reasonable likelihood that the jury applied the challenged instruction in the wrong way. Counsel has proffered testimony from three jurors that parole was a crucial factor in the minds of the jurors and that if informed that Ramdass was

ineligible for parole that factor would have changed their vote.

As the Supreme Court stated in *Simmons* at pg. 147, the State may not create a false dilemma by advancing generalized arguments while at the same time preventing the jury from learning that the defendant will never be released on parole.

Justice O'Connor, with the Chief Justice and Justice Kennedy concurring, wrote that a capital case must satisfy the dictates of the due process clause and one hallmark of due process is defendant's ability to meet the state's case against him; therefore, when future dangerousness is the premise, due process requires that defendant not be sentenced to death on the basis of information he had no opportunity to deny, rebut or explain. *Eaton v. Commonwealth*, 244 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, ___ U.S. ___ (1991), *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 391, *cert. denied* 488 U.S. 891 (1988). The defendant must be permitted to introduce evidence pertaining to his parole ineligibility to the jury's attention.

Although Justice O'Connor would permit argument or instruction, she placed great credence in the questions of the jury, and would place even greater importance on the responses of the jurors subsequent to trial in this case.

Even the dissenters in *Simmons*, Justices Scalia, and Thomas might change their opinion knowing what the three jurors in *Ramdass* reported, since their dissents are based on the majority conclusion the parole eligibility

was a decisive factor. The dissenters felt such a conclusion was unwarranted. However, the dissenters found the parole ineligible rule reasonable. *Simmons,* at pg. 152.

This is not a new due process rule but is merely an additional example of the Supreme Court's insistence that because "death is different," state courts must admit all relevant mitigating evidence such as an unhappy upbringing and emotional disturbance, *Eddings v. Oklahoma,* 455 U.S. 104 (1982); psychological experts, *Ake v. Oklahoma;* 470 U.S. 68 (1985) or defendant's good behavior in prison. *Locket v. Ohio,* 438 U.S. 586 (1978).

Additionally, although juries are ordinarily presumed to follow the court's instructions, in some circumstances the risk that the jury cannot or will not follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitation of the jury system cannot be ignored. *Simmons* at pg. 147 *citing with approval Bruton v. United States,* 391 U.S. 123, 125 (1968)

Both rationales require the jury's sentence of death be set aside, and the case returned to the Circuit Court of Fairfax County.

Simmons, besides parole, addresses the related issue under *Gregg v. Georgia* 428 U.S. 153, 190 (1976) that accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant will live or die. *Simmons,* opinion of Justice Souter, joined by J. Stevens, 512 U.S. ___, S.Ct ___ 129 L. Ed. 2d at 148. Thus, where there is a reasonable likelihood that a juror will misunderstand, an accurate instruction is required, and any conviction resulting from the refusal to give such

an instruction should be vacated as arbitrary, capricious and wanton. Id at 148 citing *Furman v. Georgia,* 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

Bobby Lee RAMDASS

v.

COMMONWEALTH of Virginia.

No. 930693.

Supreme Court of Virginia.

Nov. 4, 1994.

Michael S. Arif, Burke (Leonard R. Piotrowski; Sharon B. Soloway, Martin, Arif & Soloway, on brief), for appellant.

Katherine P. Baldwin, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

WHITING, Justice.

Bobby Lee Ramdass pleaded guilty to the robbery of Mohammad Z. Kayani immediately preceding his trial for the capital murder of Kayani. The capital murder charge was predicated on Ramdass's alleged murder of Kayani in the commission of robbery while armed with a deadly weapon, Code § 18.2-31(4), and the use of a firearm in the commission of Kayani's murder, Code § 18.2-53.1. The trial court deferred action on Ramdass's guilty plea.

In a bifurcated jury trial conducted under the provisions of Code §§ 19.2-264.3 and-264.4, Ramdass was convicted of Kayani's capital murder. In the second phase of the trial, the jury fixed Ramdass's punishment at death, based upon the "future dangerousness" predicate of Code § 19.2-264.2.

Following consideration of a probation officer's report, the court imposed the death sentence fixed by the jury. The court also imposed a life sentence based upon its finding of Ramdass's guilt for Kayani's robbery and imposed the four-year sentence fixed by the jury for the firearms violation. We affirmed those judgments and the sentence to death. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993).

In a summary disposition, the Supreme Court granted Ramdass's petition for a writ of certiorari on June 20, 1994, vacated the judgment, and remanded the case to this Court "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 [129 L.Ed.2d 133] (1994)." *Ramdass v. Virginia*, ___ U.S. ___, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Accordingly, by order entered July 29, 1994, we placed this case on our September 1994 docket with directions for appropriate briefing and argument.

We rejected Ramdass's contention in his earlier appeal that the trial court erred in not answering the jury's question, "If the defendant is given life, is there possibility of parole at some time before his natural death?" *Ramdass*, 246 Va. at 425, 437 S.E.2d at 573. We did so because of our established rule that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Id.* at 426, 437 S.E.2d at 573.

In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to

information concerning the defendant's parole ineligibility. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2198. Hence, *Simmons* applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1-151(B1) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B1). They were:

(1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery

in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

Affirmed.

NO. ___

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1994

BOBBY LEE RAMDASS,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

LEONARD R. PIOTROWSKI
8996 Burke Lake Road, Suite 200
Burke, Virginia 22015

MICHAEL S. ARIF
MARTIN & ARIF
8996 Burke Lake Road, Suite 200
Burke, Virginia 22015

* * *

used in the penalty phase, you must be convinced beyond a reasonable doubt that the defendant committed these crimes."

This is the same as the constitutional requirement of reliability which, at the very least, mandates that the state be required to satisfy the reasonable doubt standard of proof before it may rely upon evidence of unadjudicated misconduct.

The admission of evidence of past unadjudicated acts resulted in a sentence of death based upon facts that were necessary to its imposition but were not found beyond a reasonable doubt (Va. Code Ann. §19.2-264.4(C); *Watkins v. Commonwealth*, 229 Va. 469, 488, 331 S.E. 2d 422, 436 (1985)). The admission of such facts was, therefore, violative of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

III. WAS PETITIONER DENIED DUE PROCESS OR HIS EIGHTH AMENDMENTS RIGHTS BY THE STATE SUPREME COURT DECISION OF PAROLE INELIGIBILITY; THE REFUSAL OF THE TRIAL COURT TO INSTRUCT ON PAROLE STATUS OR THE TRIAL COURT'S REFUSAL TO RESPOND TO JURY INQUIRY AS TO PAROLE STATUS VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS?

Upon remand, the Virginia Supreme Court determined over defense argument to the contrary that defendant was eligible for parole.

Virginia Code §53.1-151(B) (1) establishes ineligibility for parole when a defendant has been convicted of *three* separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of these offenses when such offenses were not part of a common act, transaction or scheme.

The Virginia Supreme Court concluded that on January 30, 1993, when the jury was considering Ramdass' penalty, he did not meet these criteria because he had only two *separate* felony convictions within the meaning of the statute.

On January 22, 1993, Ramdass was convicted of the armed robbery of two people at a Pizza Hut. This involved two counts, two separate findings of guilty and two separate sentences, but since both convictions arose from the same transaction, they are considered as one felony offense for the purpose of parole, concluded the Virginia Supreme Court.

The Court further ruled that the capital murder conviction and robbery of the victim also amounted merely to one conviction, although Defendant pled guilty to the robbery just prior to trial, the jury was so informed, and the trial judge refused to sentence although requested to do so by the defense. These events also were the result of one transaction and counted only as one conviction, concluded the Virginia Supreme Court.[11]

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[11] Ramdass also pled guilty to a robbery charge on the day of the trial before the proceedings had begun. The judge refused to pass sentence until after the Commonwealth had produced evidence in the capital murder trial. He eventually gave a life sentence for the robbery charge. However, he refused to enter a finding of guilt and/or sentence Ramdass prior to jury deliberation in the capital murder.

The Court further found that a jury determination of guilty as to another clearly separate and distinct armed robbery in Alexandria, Virginia on January 7, 1993 did not count because the judge merely had not yet approved the jury's recommendation, citing *Smith v. Commonwealth*, 592-93 113 S.E. 707, 709 (1922).

The *Smith* case is simply inapplicable. The controversy there surrounded the meaning of "conviction" as referred to in Va. Code 1919, §2705.[12] The Court held that in cases concerning the removal of public officers, the Circuit Court requires a verdict *and* entry of judgment before employment may be terminated. *Id.* at 708 (emphasis added). This case has been used as precedent around the country, but only in instances where a public official is to be removed from office. See *State v. Levi*, 153 S.E. 587 (W. Va. 1930); *State v. Langer*, 256 N.W. 377 (N.D. 1934); *Keogh v. Wagner*, 246 N.Y.S.2d 269 (N.Y. 1964); *Slawick v. Folsom*, 410 A.2d 512 (Del. 1979); and *People v. Lisinski* 446 N.E.2d 1251 (Ill. App. Ct. 1983). The statute and its reasoning are no longer viable.

The Defendant was "convicted" on January 7, 1993, as the term is defined by this court. In *Deal v. United States*, 113 S. Ct. 1993 (1993), this Court grappled with the

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[12] Va. Code 1919, §2705, authorizes the Circuit Court to remove *state and county officers* convicted of any offense involving moral turpitude. This code section was subsequently changed to Va. Code §15.1-63 and later repealed altogether in 1975.

question of what is meant by "convicted. The statute in *Deal*, 18 USC § 924, was also a sentence enhancement statute.

This court held that "[i]n the context of §924(c)(1) we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction" rather than meaning 'judgment of conviction.' " *Id*. at 1965. The court further rejected the notion that conviction means the entry of judgment of conviction:

> But if we give the term 'convicted' a meaning similar to what petitioner contends is meant by 'conviction, – as connoting, that is, the entry of judgment, which includes sentence – we . . . confront a situation in which the prescription of the terms of a sentence cannot be effective until it is too late, i.e., until after the sentence has already been pronounced.

Id. at 1997.

In fact, this Court has also stated that in " . . . some circumstances . . . a guilty plea alone [is] enough to constitute a 'conviction' . . . [because] like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 112-13, 103, S. Ct. 986, 992, 74 L. Ed. 845 (1982) (citing *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582 583, 71 L. Ed. 1009 (1927).

The Court further stated that the meaning of language cannot be determined in isolation, but must be

drawn from the context in which is it used. *Deal*, at 1996. Va. Code §53.1-151(B)(1) states:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape, or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivision (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

Taken in context, it is not apparent that any special meaning of "conviction" was intended to be assigned to the term. if the term could always be susceptible to interpretation, then the Court will be clogged with endless litigation over the meanings of each and every word that is subject to more than one definition. Judges and juries will be relegated to the duty of logophilologists.

Other state courts have reached similar results. In *State v. Lewis*, 564 So. 2d 765, that Court stated that the

> ordinary meaning of 'conviction' when used to designate a particular state of a criminal prosecution, is the confession of an accused in open court or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt.

Id. At 768 (citing 16 Corpus Juris 1266).

The common vernacular use of the phrase "to convict" means "to prove or declare guilty of an offense." The Random House Dictionary 202 (concise ed. 1980). In legal parlance, it is the "result of a criminal trial," "the act of convicting a person," or the *"finding [of] a person guilty*

by verdict of a jury." Black's Law Dictionary 403 (revised 4th ed. 1968) (emphasis added).

Simmons v. South Carolina, 512 U.S. ___, 114 S. Ct. 2187 (1994), held that the parole ineligibility status should be disclosed to the jury before deliberation. Without this disclosure, the jury was faced with "a false choice between sentencing the petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility." *Id.*, 114 S. Ct. at 2193. In concerns of future dangerousness, "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he will never be released on parole." *Id.* at ___, 114 S. Ct. at 2194.

Revelation that the Defendant became ineligible for parole two weeks after he was sentenced to die by a jury pursuant to the administrative function of approving a jury verdict previously imposed hardly serves to offset the grievous misconception of the jury that Defendant was or would be sentenced to a limited period of incarceration.

Nor does this decision by the Virginia Supreme Court do anything to support the heightened standard for reliability in death cases. To the contrary, it encourages inaccurate sentencing information and deprives the jury of the ability to make a reasoned determination of life or death. The jury was aware of the conviction, since it was introduced by the prosecution, and the sentence imposed by the other jury; but not its automatic result if approved by the judge.

The Supreme Court of New Mexico was one of the first courts to apply *Simmons*. In *Clark v. Tansy*, 882 P. 22d 527 (N.M. 1994), the Court overturned a capital conviction because the ineligibility for parole of the defendant was not disclosed to the jury prior to deliberation. *Id.* at 534. However, the court in dicta noted their belief that due process entitled the petitioner to disclose to a jury the minimum length of his sentence if other than death was imposed. The court further reasoned that once the length of incarceration facing a convicted felon is asserted by defendant to be mitigating evidence, the trial court must impose the sentence on noncapital charges before the jury deliberates on the capital charges. The court reasoned that the length of incarceration before parole is relevant information that should be presented to the jury upon the request of counsel and that such includes a request for sentencing on the noncapital offenses to which defendant pleads guilty. If such an instruction is not required, then the state has succeeded in securing a death sentence based on future dangerousness, while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative. *Id.* at 533; *Simmons v. South Carolina*, 512 U.S. ___, 114 S. Ct. at 2193.

Death as a punishment is singular in its severity and finality. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); *Id.*, at 306 (Stewart, J., concurring). Because of the qualitative difference between the death penalty and all other punishments, due process and the proscription against cruel and unusual punishment are not satisfied unless the procedures upon which a sentence of death may be rendered

are both certain and reliable. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In *Lockett*, the Court emphasized that sentencing procedures "call[ ] for a greater degree of reliability when the death sentence is imposed." *Id.* at 604. In *Mills v. Maryland*, 486 U.S. 367, 376 (1988), the Court required a "greater certainty" that the sentencing jury's conclusions rested on proper grounds because the penalty imposed was death. This heightened need for sentencing reliability and certainty "makes it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness." *State v. Bey*, 548 A.2d 887, 903 (N.J. 1988) (quoting *State v. Biegenwald*, 524 A.2d 130, 155 (N.J. 1987)).

The fact that Ramdass could be sentenced to "life imprisonment plus" is certainly a mitigating factor, particularly when the Defendant could be serving three (3) consecutive life sentences without parole.

IV. THE DECISION OF THE SUPREME COURT OF VIRGINIA VIOLATED THE SEPARATION OF POWERS DOCTRINE AND CONSTITUTED AN ABUSE OF DISCRETION.

According to the case law of the Supreme Court of the United States, the judicial branch of Virginia encroached on the duties of the executive branch when it defined the word "conviction" for parole eligibility.

The basis for the separation of powers doctrine lies in The Federalist, No. 47. There, James Madison wrote:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny.

The Federalist, No. 47, p 324 (J. Cooke, Ed., 1961) (J. Madison).

Since then, the Supreme Court has had many opportunities to rule on this encroachment of power by one branch or another.

In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Court promulgated a test to see if the legislature had encroached on the executive branch: "Whether actions taken by either house are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect. *Id.* at 952. Justice Powell expanded on this by saying that even though the boundaries between the branches are not fixed and definite, the court has not hesitated to enforce the doctrine of separation of powers when one branch has impaired or sought to assume a power central to another branch. *Id.* at 962-963 (Powell, J., concurring). Furthermore, the doctrine functionally could be violated in two ways. First, one branch may interfere impermissibly with the other's performance of its constitutionally assigned function. *Id.* at 963; See *Nixon v. Administrator of General Services*, 443 U.S. 425 (1977), *United States v. Nixon*, 418 U.S. 683 (1974). Second, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *Id.*;

See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Accordingly, the judiciary has taken actions that can properly be regarded as an assumption of executive power, both in its character and effect. The Parole Board is part of the executive branch of the Commonwealth of Virginia. Its rules and regulations are promulgated according to the executive's power of criminal prosecution. In promulgating these rules and regulations, the Parole Board has chosen its terms precisely and deliberately.

The judiciary, by defining the terms chosen by the Board, has usurped and exercised a purely executive power. *See generally, Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Furthermore, the judicial branch has impermissibly interfered with and impeded the Parole Board's ability to apply the parole eligibility rules as it intended. The separation of powers doctrine was violated because it is the Parole Board, and the Parole Board alone, that can definitively state what meaning it intended to assign to the word "conviction." Thus, according to both the majority opinion and Justice Powell's concurrence, the judicial branch impermissibly encroached upon the executive branch and usurped a purely executive function.

According to case law of the Virginia Court of Appeals, the judicial branch of Virginia encroached on the duties of the executive branch when it defined the work [sic] "conviction" for parole eligibility.

In *Garrett v. Commonwealth*, 415 S. E. 2d 245 (1992), the court visited two questions. One, whether the trial

court had authority to determine whether defendant's robbery convictions were part of a common act transaction, or scheme, and thereby affect his eligibility for parole pursuant to Va. Code §53.1-151(B)(1); and two, whether the trial court erred in finding that the robberies for which the defendant was convicted were not part of a common act, scheme or transaction for purposes of determining parole eligibility pursuant to Va. Code §53.1-151(B)(1). *Id.* at 247.

The court held that the "trial court *did not* have authority in these circumstances to determine defendant's eligibility for parole." *Id.* (emphasis added). The court went on to state that "[b]oards of parole are 'given absolute discretion in matters of parole' . . . [and] courts cannot properly grant parole or determine eligibility for parole." *Id.* (quoting *Jackson v. Shields*, 438 F. Supp. 183, 184 (1977.)) The only caveat to this rule occurs in circumstances where the responsible agency has acted in an arbitrary or capricious manner, abused its discretion, or where the petitioner has been denied a constitutional right. *Id.* None of those exceptions are applicable to the present case.

Therefore, it appears the Virginia Supreme Court violated its own proscription not to determine parole eligibility. Further, they did so without an evidentiary hearing on the matter.

V. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY REQUIRING HIM TO DISCLOSE TRIAL STRATEGIES IN OPEN COURT IN AN ATTEMPT TO SECURE EXPERT ASSISTANCE.

This Court has held that when a state brings its judicial power to bear against an indigent Defendant, it is a violation of both the Due Process and Equal Protection clauses of the Fourteenth Amendment not to appoint and pay for the "basic tools of an adequate defense." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). The Virginia courts provide for a psychologist only – this is not the only basic tool of an adequate defense.

* * *

IN THE SUPREME COURT OF VIRGINIA

BOBBY LEE RAMDASS,
Prisoner Number 161453,
Petitioner,
v.
RONALD ANGELONE,
Director, Virginia
Department of
Corrections
and
J. D. NETHERLAND,
Warden, Mecklenburg
Correctional Center,
Respondents.

Record Number _____
(Filed Aug. 30, 1995)

PETITION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE JUSTICES OF THE SAID COURT:

Comes Now the Petitioner, Bobby Lee Ramdass, by his undersigned appointed counsel, and represents to the Supreme Court of Virginia that he is illegally detained, under sentence of death, in the custody, control, and confinement of the Respondents and their agents and employees at the Mecklenburg Correctional Center of the Virginia Department of Corrections, located in Boydton, in the County of Mecklenburg, Commonwealth of Virginia, and that his confinement is in violation of the Constitution of the United States and the Constitution and the laws of the Commonwealth of Virginia.[1]

[1] Simultaneous with the filing of this Petition, Petitioner has filed a Motion to Determine Status of Petitioner's Rights

* * *

refusal gave the jury absolutely no standard by which to ensure the reliability of such testimony and prejudiced the Petitioner.

13. The Trial Court Erred In Failing To Instruct the Jury About Petitioner's Parole Eligibility In Violation Of *Simmons v. South Carolina.*

17. The prosecution improperly introduced evidenced concerning the Virginia parole system during the penalty state of trial (TR. 1/29/93 p. 130-131). The prosecution explained the differences between mandatory and discretionary parole and introduced evidence that the Petitioner received a seven-year sentence on a prior charge but was released on mandatory parole in only four years. The confusion in the minds of the jurors was quite apparent when they asked the court what Petitioner's eligibility for parole would be if he were given a life sentence. (TR. 1/29/93 p. 278).

18. In *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), the United States Supreme Court held that when the state raises the issue of future dangerousness of a defendant facing a capital charge, due process requires that the defendant be allowed to inform the jury if he will never be eligible for parole. Moreover, courts have long

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and Responsibilities With Respect to Habeas Corpus Proceedings, and Motion to Hold Proceedings in Abeyance, and Request for Leave to Amend Petition for Writ of Habeas Corpus, which Petitioner incorporates into the instant pleading by specific reference.

held that a capital defendant has a due process right to rebut evidence of the existence of aggravating circumstances in support of a death sentence. *Gardner v. Florida*, 430 U.S. 349 (1977); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Ake v. Oklahoma*, 470 U.S. 68 (1985). Also clear is the right to present evidence in support of a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion). The Eighth Amendment requires that courts impose a heightened standard for reliability in sentencing a person to death. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Mills v. Maryland*, 486 U.S. 367 (1988); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Beck v. Alabama*, 447 U.S. 628 (1980).

19. As Justice Scalia noted in his dissent in *Simmons*, the rule adopted in *Simmons* is "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole whenever the prosecution argues future dangerousness." *Simmons*, 114 S. Ct. at 2203 (Scalia, J., dissenting). Thus, if juries must be informed of a defendant's permanent parole ineligibility, they must also be informed of a defendant's ineligibility for parole for a substantial period of time, because such evidence is as relevant to future dangerousness as evidence of permanent ineligibility. Differences in the length and permanence of the ineligibility go to the weight of the evidence, not to its relevance.

20. In addition, evidence of parole eligibility must be admitted in order to ensure the reliability of the death

sentence. Jury confusion concerning the actual length of a sentence of life imprisonment distorts the choice facing the jury and undermines the reliability of its decision to sentence a defendant to death rather than life imprisonment. As Justice Souter noted in his concurring opinion in *Simmons*, this confusion is contrary to the Eighth Amendment's "heigthened standard for reliability in the determination that death is the appropriate punishment in a specific case," which requires that jurors be "instructed on the proper meaning of sentencing terms whenever there is a reasonable likelihood of misunderstanding." *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring). Moreover, fundamental respect for humanity requires that defendants facing the death penalty be permitted to present any evidence that they consider mitigating. *See, e.g., Skipper, Eddings, Lockett.*

21. In Petitioner's case, because the jury was not instructed on the true meaning of a sentence of life imprisonment, the jurors improperly speculated among themselves about when Petitioner might be released from prison. This is quite obvious considering the jury's question to the court and the fact that some jurors later stated that they would have considered a sentence of life imprisonment if they had known that Petitioner would not have been eligible for parole in his lifetime.

14. The Trial Court Erred In Denying The Defendant's Motion For the Appointment Of An Investigator.

22. On December 8, 1992, trial counsel moved for the appointment of an investigator to assist in the preparation of the Petitioner's case. This motion was improperly denied, which seriously impaired trial counsel's ability to gather the evidence necessary to put on a proper defense in the guilt phase and penalty phase.

23. This trial took place a little more than four months after Petitioner's arrest. It is quite obvious from the record that trial counsel's investigation was incomplete, as the lack of investigative support rendered trial counsel unable to adequately interview prosecution witnesses or develop suitable mitigation evidence for use during the penalty phase.

15. Petitioner Was Prejudiced By These Errors.

24. Petitioner was prejudiced by the trial court's errors set forth above in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 8, 9, and 11 of the Virginia Constitution. But for the trial court's errors, there is a reasonable likelihood that the Petitioner would not have been convicted of capital murder and sentenced to death.

D. THE VIRGINIA SUPREME COURT'S PROPORTIONALITY REVIEW OF PETITIONER'S CASE WAS INADEQUATE, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE VIRGINIA AND UNITED STATES CONSTITUTIONS.

This Claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this Claim by specific reference.

2. Section 17-110.1 of the Code of Virginia require the Supreme Court of Virginia to review all capital murder cases resulting in a death sentence to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This statutory right creates a liberty interest under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Virginia

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 18th *day of* March, 1996.

Bobby Lee Ramdass,

Petitioner,

against Record No. 951594

Director of the Department of Corrections, et al.,

Respondents.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations B(1) through (8), C(2), C(4) through (9) and D; the rule in *Hawks* v. *Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations C(1), C(3) and C(10) through (14); and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, the Court denies petitioner's motion to remand for evidentiary hearing. It is therefore ordered that the said petition be dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Patricia Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

BOBBY LEE RAMDASS,

Petitioner,

v. Action No. 2:96cv831

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

INITIAL PETITION FOR A WRIT OF HABEAS CORPUS, SUBJECT TO AMENDMENT

John M. Ryan (Va. Bar #4301)
F. Nash Bilisoly (Va. Bar #19066)
VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P.
500 World Trade Center
Norfolk, Virginia 23510-1699
(757) 446-8600

Michele J. Brace (Va. Bar #36748)
VIRGINIA CAPITOL REPRESENTATION RESOURCE CENTER
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

* * *

pursuant to mitigating factors in cases."[9].2 (TR 4/02/93 p. 66). The court imposed the death sentence without comment. (TR 4/02/93 p. 74).

III. REASONS FOR GRANTING THE WRIT

57. Petitioner's conviction of capital murder and his sentence of death were obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as more fully alleged in the following claims.[10] To the extent that counsel rendered ineffective assistance in violation of the Sixth Amendment, there is a reasonable probability that, absent counsel's deficient performance, the result would have been different with respect to guilt and/or sentence. All other constitutional violations were harmful in that they had a substantial and injurious effect or influence on the determination of guilt and/or sentence.

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[9] Trial counsel when [sic] on to argue.

> If they [the jury] had the right and they should have the right in this case because it's denying to the jury a crucial litigating factor which we're not supposed to be doing anymore. we're supposed to be able to present under the Constitution and under Ackey and Locket, we're supposed to be able to present to the Court all mitigating factors. It's surely unusual and surely strange when saying that the person is going to spend the rest of their life in prison as a mitigating factor, but under these circumstances, it surely and certainly is a mitigating factor.

(TR 4/02/93 p. 67).

[10] Petitioner incorporates all allegations in this petition into each claim, regardless whether the claim includes a specific reference to such incorporation.

A. The Court's Failure to Allow Consideration of Mr. Ramdass' Parole Ineligibility Violated his Rights under the Eighth and Fourteenth Amendments.

This claim is evidenced by the following facts:

58. All other allegations in this petition are incorporated into this claim by specific reference.

59. The United States Supreme Court has repeatedly emphasized that "the penalty of death is qualitatively different from a sentence of life imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), the Court recognized that,

> From the point of view of the defendant, it [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

The qualitative difference between death and other penalties mandates a greater degree of reliability when a death sentence is imposed. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

60. It is an elemental due process requirement that a defendant not be sentenced to death based upon evidence which he did not have an opportunity to deny or explain. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). In addition to

the due process right to rebut, the Eighth Amendment requires that capital sentencing jurors not be precluded from considering any mitigating factor offered by the defendant as a basis for a sentence less than death. *Lockett*, 438 U.S. at 604. Mr. Ramdass was not permitted an opportunity to deny or explain the evidence presented by the prosecution with regard to Mr. Ramdass' future dangerousness. Similarly, the trial court prevented Mr. Ramdass from presenting mitigating evidence and argument of his parole ineligibility.

61. Before a defendant is eligible to be sentenced to death in Virginia, the sentencer must find either that there exists a "probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" ("future dangerousness"), or that the capital offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim ("vileness"). Va. Code § 19.2-264.2 The prosecution bears the burden of proving aggravating circumstance beyond a reasonable doubt. Va. Code § 19.2-264.4(C).

62. The prosecution did not oppose trial counsel's *motion in limine* to exclude vileness as a predicate for a death sentence and agreed that Mr. Ramdass' death sentence would not be pursued on that basis. (TR 1/29/93 p. 7-8.) Thus, Mr. Ramdass' future dangerousness, his "continuing serious threat to society," was the sole aggravating circumstance upon which the jury could find that Mr. Ramdass was eligible for a sentence of death. (TR 1/29/93 p. 8.) Absent proof beyond a reasonable doubt that there was a probability that Mr. Ramdass would

constitute a continuing serious threat to society. Mr. Ramdass could not be sentenced to death.

63. If the sentencer finds at least one aggravating factor beyond a reasonable doubt, the threshold test for death *eligibility* is satisfied, and the sentencer must then decide whether a death sentence is *appropriate*. For this purpose, the sentencer considers all of the evidence, including the mitigating evidence.

64. During the sentencing phase of the capital murder trial, the prosecution repeatedly introduced improper evidence concerning the Virginia parole system. (TR 1/29/93 pp. 85-86, 130-31.) The prosecution explained the difference between mandatory and discretionary parole and introduced evidence that Mr. Ramdass received a seven-year sentence on a prior charge but was released on mandatory parole in only four years.

65. The confusion in the jurors' minds became apparent when, in the midst of their deliberations following the sentencing phase, they sent a question to the court requesting advice as to the effect of Mr. Ramdass' parole eligibility on a life sentence. The jurors inquired, "If the defendant is given life, is there a possibility of parole at sometime before his natural death?" (TR 1/29/93 at p. 278.) The court refused to answer the question. Instead, the trial court instructed the jury that "If you find the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (TR at p. 279.)

66. At that time, Mr. Ramdass had been judged guilty of and sentenced to 76 years for the Pizza Hut

Restaurant robbery crimes; had been found guilty by a jury of the Domino's robbery, with the jury's sentences fixed at 18 years; had plead guilty to the robbery of the 7-Eleven convenience store and was awaiting sentencing and had been found guilty of the capital murder. Thus, at that time, Mr. Ramdass was ineligible for parole, and the court's instruction violated Mr. Ramdass' Eighth and fourteenth Amendment rights.

(1) The Legal Standards

67. In *Simmons v. South Caroline*, 512 U.S. ___, 114 S. Ct. ___, 129 L. Ed. 2d 133 (1994), the Supreme Court recognized that when the prosecution argues a capital defendant's future dangerousness, the trial court's failure to adequately instruct a capital jury on the significance of a defendant's ineligibility for parole on a life sentence violates the defendant's constitutional rights. In *Simmons*, after the prosecution raised the specter of the defendant's future dangerousness to society, the jury sent a note to the judge asking a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Simmons*, 129 L. Ed. 2d at 140. Over the defendant's objections, the trial court instructed the jury not to consider parole or parole eligibility in reaching its verdict: "Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The term 'life imprisonment' and 'death sentence' are to be understood in their plan (sic) and ordinary meaning." *Id.* Deprived of information about the meaning of a life sentence, the jury returned a sentence of death. The Supreme Court found that the prosecution had "succeeded in securing a death

sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its non-capital sentencing alternative, namely, that life imprisonment meant life without parole." This, the court found, was a clear violation of the defendant's due process right to rebut. In this case, as in *Simmons*, the trial court similarly refused to instruct the *Ramdass* jury on the meaning of a life sentence under Virginia law.

68. The Supreme Court's decision in *Simmons* reaffirmed the well-established constitutional principle that a defendant may not be sentenced to death based on evidence which he did not have an opportunity to deny or explain. Fundamental due process requires that a defendant have the opportunity to rebut evidence used against him in a capital proceeding. *Simmons*, 129 L. Ed. 2d at 141-43 (*citing Gardner*, 43 U.S. at 362, *Skipper v. Lockhart*, 476 U.S. 1, 5n.1 (1986)). The Court found that parole ineligibility was unquestionably relevant to rebutting the prosecution's claim of future dangerousness, declaring that

> [i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society that a defendant who is not. Indeed there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so

> crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Simmons, 129 L. Ed. 2d at 142-43. The Fourteenth Amendment does "not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law." *Id.* at 144n.5. The *Simmons* defendant was repeatedly denied an opportunity to inform the jury that he never would be released on parole. Being denied a "straight answer" about parole eligibility, the jury was left to speculate about the defendant's future dangerousness.

69. The Eighth Amendment also compels that capital sentencing juries, faced with the dilemma of deciding between life and death, be informed of a defendant's parole ineligibility. *Id.* at 147-48. (Souter, J., joined by Stevens, J. concurring). The heightened standard of reliability applied to capital sentencing requires that accurate sentencing information be provided as "an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 190 (1972)). Whenever, as in *Simmons*, there is a reasonable likelihood that jurors misunderstand the effect of sentencing terms, particularly where a request for clarification of the meaning of the sentencing alternatives has been refused by the trial court, the death sentence "should be vacated as having been 'arbitrarily or capriciously' and 'wantonly

and . . . freakishly imposed.' " *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 249 (1972)).

70. The United States Supreme Court remanded Ramdass, in light of *Simmons*. *Ramdass v. Virginia*, 512 U.S. ___, 114 S. Ct. 2701, 129 L. Ed. 2d 830 (1994). On remand, the Virginia Supreme Court arbitrarily determined that Mr. Ramdass had not been "convicted" of three qualifying felonies and therefore was not statutorily ineligible for parole under Virginia Code § 53.1-151(B1). *Ramdass v. Commonwealth*, 248 Va. 518, 520-21, 450 S.E.2d 360, 361 (1994) *cert. denied*, 115 S. Ct. 1800 (1995).

71. Sections 53.1-151(B1) provides that a prisoner is ineligible for parole consideration if he has three convictions for (i) murder, (ii) rape, or (iii) robbery by presentation of firearm or using deadly force. Offenses occurring as part of the same transaction (for example, the robbery of the 7-Eleven store and the murder of Mr. Kayanni) do not count as separate convictions for purposes of § 53-151(B1). The Court reasoned that while Mr. Ramdass' Pizza Hut convictions and the combined guilty plea to robbery and guilty verdict in the capital murder trial were qualifying felony "convictions" under § 53.1-151(B1), the guilty verdict in connection with the Domino's Pizza robbery did not qualify because the jury's sentence for that offense had not yet been imposed and final judgment had not been entered. *Ramdass*, 248 Va. at 520. This arbitrary and capricious interpretation of the facts and the law violated Mr. Ramdass' Fourteenth Amendment due process rights and circumvented the clear constitutional mandate of *Simmons* and the settled law that dictated the result in *Simmons*.

(2) The Virginia Supreme Court's Arbitrary Refusal to Apply Simmons v. South Carolina Based on its Holding That Mr. Ramdass Was Not Statutorily Ineligible for Parole under Virginia Code § 53.1-151 Violated Mr. Ramdass' Due Process Rights.

This claim is evidenced by the following facts:

72. All other allegations in this petition are incorporated into this claim by specific reference.

73. Where state law creates a right which involves a person's liberty, the individual possessing this right is entitled to federal due process to "insure that the state created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Virginia statutes governing parole determinations have been held to confer liberty interests protected by the Due Process Clause. *Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977) *cert. denied*, 435 U.S. 1003 (1978). This Court has recognized that "logic dictates that if a prisoner has a protectable liberty interest in being considered for parole, then he has an equally protectable interest in being considered for parole eligibility." *Krawertz v. Murray*, 742 F.Supp. 304 (E.D. Va. 1990) (Clarke, J.). The result does not vary depending on whether it is in an individual's interests to be determined eligible or ineligible for parole. Thus, the determination of whether Mr. Ramdass was ineligible for parole must meet minimum federal due process standards. The Virginia Supreme Court's determination that Mr. Ramdass was not ineligible failed to comply with those standards. In particular:

a. *The Virginia Supreme Court's decision was ultra vires.*

74. When determining on remand that Mr. Ramdass was not statutorily ineligible for parole at the time of his original trial, the Virginia Supreme Court was acting outside the scope of authority granted by Virginia Code § 53.1-151, and thus its determination was *ultra vires.* Under Virginia Code § 53.1-151(B1), determinations of parole ineligibility are to be made by the Virginia Department of Corrections, which is an agency of the executive branch of the government.[11] Virginia's courts cannot properly determine parole eligibility. *Garrett v. Commonwealth*, 14 Va. App. 154, 157, 415 S.E.2d 245, 247 (1992); *see also Jackson v. Shields*, 438 F.Supp. 183, 184 (W.D. Va. 1977). It is within the exclusive province of the Virginia Department of Corrections to make such determinations. *Id.* A court may not intervene absent a showing that the agency's parole eligibility determination was "arbitrary or capricious," an abuse of the agency's discretion or in denial of a constitutional right. *Id.* in *Ramdass,* the Virginia Court was not dealing with such a case.

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[11] The Department of Corrections makes the first determination of parole eligibility. This determination may be superseded by a judgment of the Parole Board Va. Code § 3.1-151(B1). The statute plainly provides for no further review beyond the Parole Board.

b. *The Virginia Supreme Court's decision was arbitrary*

75. The Supreme Court's determination in its remanded Ramdass opinion, *Ramdass v. Commonwealth,* 248 Va. 518 (1994) *cert. denied,* 115 S. Ct. 1800 (1995) (*Ramdass2*), that Mr. Ramdass was not ineligible for parole was unconstitutionally arbitrary and violated Mr. Ramdass' constitutional due process guarantees. Relying on the 1922 case of *Smith v. Commonwealth,* 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922), the court held that since judgment had not yet been entered on the January 7th Domino's Pizza robbery jury verdict, that case could not count as a conviction rendering Mr. Ramdass ineligible for parole under Virginia Code § 53.1-151. The inconsistency of the court's decision, the failure of the court to recognize contrary precedent, and the decision's irreconcilability with the plain language of the statute illustrate the arbitrary nature.

i. The decision was internally inconsistent

76. The Virginia Supreme Court's opinion in *Ramdass 2* contradicts itself. The court states that Virginia's statute regarding ineligibility for parole requires three separate qualifying criminal incidents. According to the state court's opinion, Mr. Ramdass' conviction for the Pizza Hut robbery for which he was sentenced on January 22, 1993, constituted one "felony offense." His conviction for Mr. Kayanni's capital murder and the 7-Eleven robbery in the same transaction constituted a second

qualifying "felony offense." However, Mr. Ramdass' January 7, 1993 jury conviction for armed robbery of Domino's Pizza was not a qualifying "felony offense" within the meaning of the statute because, although Mr. Ramdass had been found guilty, judgment had not been entered on the verdict.

77. This is arbitrary and internally inconsistent. The procedural posture of the Domino's Pizza robbery was identical to that of the 7-Eleven robbery/capital murder. In both cases, the jury had determined that Mr. Ramdass was guilty of the crime. In both cases, judgment had not been entered. The Domino's Pizza robbery was arguably closer to entry of judgment than the capital murder case because the jury had already fixed a sentence for that robbery.

78. The Virginia Supreme Court correctly recognized that the 7-Eleven robbery/capital murder offense counted as a "felony offense" for purposes of Section 53.1-151(B1). It arbitrarily refused to accord the same status to the identically situated Domino's Pizza robbery. Thus, the Virginia Supreme Court, either in spite of or because of the *Smiths precedent, concluded that two procedurally identical criminal proceedings were the opposite of one another for the purposes of the statute. The state court's decision in Ramdass 2* is irrational; it is unconstitutionally arbitrary and denied Mr. Ramdass due process of law.

ii. The decision ignored contrary Virginia authority

79. In *Smith v. Commonwealth*, 134 Va. 589, 117 S.E. 707 (1922), the court held that a guilty plea or jury verdict

was insufficient to count as a "conviction" for the purpose of a statute providing for the discharge of a constitutional officer "convicted of an act constituting a violation of any penal statute involving moral turpitude." Instead, entry of a final judgment was required before a Commonwealth Attorney could be terminated for trafficking in white slavery. The Virginia Supreme Court's failure to recognize other more recent interpretations of the term "conviction" evidences the arbitrary nature of its decision. In *Fields v. Commonwealths*, 5 Va. App. 229, 361 S.E.2d 359 (1987), for example, the Virginia Court of Appeals declined to apply the *Smith* interpretation of "convicted" in the context of witness impeachment. In *Fields*, the Court of Appeals held that where a witness has plead guilty, he has the status of a convicted felon, even though no judgment has yet been entered on the verdict. The *Fields* court acknowledged *Smith*, but stated that the older case must be limited to its facts.

iii. The decision contravenes the "plain language" of the Statute

80. The Virginia Supreme Court's definition of a "conviction" in *Ramdass 2* is at odds with the legislature's use of the term in the statute itself. Paragraph A of the parole eligibility statute concerns the parole *eligibility* status of non-capital offenders and expressly applies to "every person *convicted of a felony* and *sentenced* and *committed* by a court." Va. Code Ann. § 53.1-151A. The language reflects a clear distinction between conviction and

sentencing. Paragraph B of the same statute deals specifically with parole *ineligibility* (the "three strikes provision"), both in the cases of capital and non-capital crimes. The terms "sentenced" and "committed" are excluded.[12] Applying the "plain meaning" rule of statutory construction to the clause at issue, sentencing is clearly not a part of the Virginia three strikes statute. *See Krawetz v. Murray*, 742 F. Supp. 304, 306-07 (E.D. Va 1990) (Clarke, Jr.) (considering Va. Code § 53.1-151A).

81. The definition of a "conviction" announced by the Virginia Supreme Court in *Ramdass 2*, requiring both a guilt determination and the imposition of a sentence renders the statutory language redundant. Had the Virginia legislature intended "conviction" to include "sentencing" in the "three strikes" portion of the statute, it would have used the same language found in Paragraph A. The Virginia Supreme Court arbitrarily ignored clear statutory language and thus deprived Mr. Ramdass of due process. Without explanation, the statutory use of the term is given an expansive interpretation serving arbitrarily to deprive Mr. Ramdass of what clearly was a central sentencing factor. This interpretation was arbitrary and Mr. Ramdass was denied his right to due process.

82. A logical construction dictates the same result. Subsection A addresses those who are in prison and when they can be released by the Department of Corrections. Subsection B focuses solely on convictions; once

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[12] For purposes of state law, the sentencing occurs upon entry of judgment. Thus, the terms "sentencing" and "entry of judgment" are equivalent.

convicted of the three "strikes," questions of sentencing and commitment are irrelevant.

83. The state court's arbitrary and illegal conclusion that Mr. Ramdass was statutorily eligible for parole had a substantial and injurious effect or influence on the sentencing decision. *See Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993) (defining standard of harmless error applied in habeas corpus proceedings to findings of constitutional violation); *O'Neal v. McAninch*, 115 S. Ct. 992 (1995) (if evidence of harm is in equipoise, court must rule in favor of petitioner).

(3) Due Process and Eighth Amendment Rights Mandate that the Sentencer Be Allowed To Consider Mr. Ramdass' Parole Information.

84. During the sentencing phase of the capital murder trial, on January 29, 1993, the jury questioned the effect of Mr. Ramdass' parole status on a life sentence. The jurors inquired, "If the defendant is given life, is there a possibility of parole at sometime before his natural death?" (TR 1/29/93 at p. 278.) Over Mr. Ramdass' objection, the court refused to provide the information requested. Instead, the trial court instructed the jury that "If you find the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (TR 1/29/93 at p. 279.)

85. Assuming without conceding, that Mr. Ramdass was not statutorily ineligible for parole on January 29, 1993, he was, nevertheless, for all intents and purposes effectively ineligible for parole. The trial court's failure

instruct [sic] the jury on Mr. Ramdass' effective parole ineligibility forced the jury to speculate on the true effect of a life sentence and rendered its sentence unconstitutionally unreliable.

86. Thus, when the jury asked the Fairfax Circuit Court whether there was a "possibility of parole" in the event of a life sentence, there was, in fact, no possibility that Mr. Ramdass would ever be released on parole. Based upon other jury verdicts, outstanding indictments for crimes that Mr. Ramdass had admitted in his penalty phase testimony and to which he intended to plead guilty, and testimony provided in open court during sentencing, it was true beyond question that Mr. Ramdass would never be eligible for parole. Mr. Ramdass was for all purposes effectively, if not statutorily, "ineligible for parole."

87. The jury did not ask whether Mr. Ramdass was "statutorily" eligible for parole "today." They asked whether he would be eligible for parole " . . . at some time before his natural death." The only accurate answer to the jury's question was, clearly, "no, he will not be eligible for release in the future." The precise rationale of *Gardner, Skipper,* and *Simmons* mandated that Mr. Ramdass be allowed to rebut the prosecution's case for future dangerousness with accurate information about his effective parole ineligibility. There was no question that by the time the Department of Corrections was called upon to assess Mr. Ramdass' parole status, he would be *de jure* ineligible for parole, even if on the day the jury asked the question, he was only *de facto* ineligible for parole. In the terms of reliable sentencing requirements in this case, the

line that was drawn between Mr. Ramdass' effective ineligibility and Virginia's statutory "ineligibility" is unreasonable and unconstitutionally arbitrary.

88. Since the decision in *Furman v. Georgia,* 408 U.S. 238 (1972), holding that state death penalty schemes were in violation of the Eighth and Fourteenth Amendments, the Supreme Court has attempted to limit the risk of arbitrary and capricious imposition of the death penalty. The need for reliability in the sentencer's determination that death is the appropriate punishment has been stressed by the Supreme Court in numerous cases. *See, e.g., Skipper,* 476 U.S. at 4; *Ake v. Oklahoma,* 470 U.S. 68, 83, 84 (1985); *Lockett v. Ohio,* 438 U.S. 586 (1978); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

89. The *Ramdass* jury, confronted with the difficult decision between life and death sentences, was deprived of information about the meaning of a life sentence necessary to reach a constitutionally reliable sentencing determination. Without accurate information about Mr. Ramdass' parole status, the jury was left to speculate over the true meaning of a life sentence.

90. Parole eligibility and the likely duration of incarceration are key factors considered by jurors in their sentencing determinations. Studies have demonstrated that Virginia citizens and jurors vastly underestimate the period of incarceration represented by a life sentence. William J. Bowers & Benjamin D. Steiner, *The Pernicious Illusion of Early Release for First Degree Murderers Not sentenced to Death, presented at* the 1996 American Society of Criminology Meeting, Chicago, Ill. (November 20-23,

1996) (hereinafter *The Pernicious Illusion*) (copy of findings attached as Exhibit E); National Legal Research Group, Jury Research and Trial Simulation Services, *Report on Jurors' Attitudes Concerning the Death Penalty* (Dec. 6, 1988) (hereinafter *Jurors' Attitudes*) (unpublished report attached as Exhibit F); *see also* Greenberg/Lake, The Analysis Group, Inc., *National Omnibus Study* (Mar. 1, 1993) (hereinafter *Omnibus Study*) (copy attached as Exhibit G).

91. A survey of capital jury eligible residents of Prince Edward County, revealed that the potential jurors believed that it is unlikely that a defendant sentenced to death would actually be executed. National Legal Research Group, *Jurors' Attitudes* at 2-3. The amount of time a defendant would serve if he were sentenced to life imprisonment for intentional murder during an armed robbery was a major concern when the potential jurors chose between life and death sentences. In the survey, a defendant sentenced to life imprisonment for intentional murder in the course of an armed robbery was viewed as likely to serve only 10 years before being released on parole. *Id.* at 3. When the question posed set the minimum time served with a life sentence at no parole, a majority of individuals said that they would be less likely to sentence the defendant to death. *Id.* at 4-5. Finally, the survey demonstrated that courts' attempts to remove parole eligibility from the jury's consideration are ineffective. *Id.* at 7. A majority of those surveyed said that they would still consider the length of time to be served in arriving at their sentencing decision, even if the trial judge specifically instructed them to the contrary. *Id.*

92. Another survey, conducted shortly after Mr. Ramdass was sentenced to death, revealed most individuals believe that despite the imposition of a "life" sentence potential jurors believe capital defendants were likely to be paroled or released back into society after serving twenty years or less in prison. Greenberg/Lake, *National Omnibus Study* at 1. Support for the death penalty dropped from a seventy-seven percent majority to a forty-nine percent minority when those surveyed were given the option of life without parole. *Id.* at 2-3.

93. A recent quality of life survey revealed that while 83% of the Virginians surveyed support the death penalty generally, the figure drops to a slim majority of 57% when the jurors were informed that the life sentence would be without the possibility of parole for a twenty-five year period, with restitution to victims' families. Center for Survey Research, Virginia Polytechnic Institute, *Quality of Life in Virginia 9*, A4 (1996) (copy attached as Exhibit H).

94. Virginia has abolished parole for capital offenses committed after January 1, 1995. Va. Code Ann. § 53.1-151(b) (Supp. 1994). Capital sentencing determinations made by juries, since being given the alternative of life without possibility of parole, reflect the importance of parole eligibility on sentencing decisions. When faced with the choice between life sentences without possibility of parole and death sentences, Virginia juries have overwhelmingly chosen lie sentences. On information and belief, only one or two capital defendants have been sentenced to death for capital crimes committed after the statute became effective on January 1, 1995.

95. The prosecution premised its attempt to procure the death penalty solely upon Mr. Ramdass' future dangerousness. (TR. 1/29/93 p. 8.) When the jury attempted to ascertain whether Mr. Ramdass could be paroled if given a life sentence, (TR. 1/29/93 p. 278), the trial judge refused to provide that information, (TR. 1/29/93 p. 279). Without accurate information necessary to determine the threat posed by Mr. Ramdass to society, the jury was left to speculate whether a life sentence meant "life without parole or something else." *See Simmons,* 129 L. Ed. 2d at 144. Believing it was the only option that would adequately protect society, the jury chose death. As jurors are likely to rely upon inaccurate perceptions regarding parole when determining the appropriate sentence, the introduction of accurate information to rebut future dangerousness is a constitutional right to which capital defendants are absolutely entitled. Mr. Ramdass was denied this fundamental right.

96. A death sentence cannot stand where it is based on misinformation because it violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Johnson v. Mississippi,* 486 U.S. 578 (1988). Likewise, it is a denial of Eight and Fourteenth Amendment rights to allow jurors to operate under their known misconceptions and misinformation on parole in assessing the appropriate punishment of life or death. There can be no reliability in sentencing under such circumstances. *See also, Caldwell v. Mississippi,* 472 U.S. 320 (1985) (prosecutor's misinformation concerning jury's role in imposing death penalty rendered sentence invalid).

97. The trial court's refusal to instruct the jury on Mr. Ramdass' effective parole ineligibility violates the

heightened reliability standards constitutionally required for capital sentencing. In *Green v. Georgia,* 442 U.S. 95, 97 (1980), the United States Supreme Court struck down Georgia's mechanical application of its hearsay rule at the capital sentencing stage because "the excluded [evidence was] highly relevant to a critical issue in the punishment phase of the trial and substantial reasons [existed] to assume its reliability."

98. Therefore, the trial court's exclusion of information about parole clearly affected the reliability of the *Ramdass* jury's sentencing determination and constituted a violation of the due process clause of the Fourteenth Amendment as well as the Eighth Amendment prohibition against cruel and unusual punishment.

99. Moreover, under the Eighth and Fourteenth Amendments, death penalty schemes must also allow sentencing juries to consider, as mitigating factors, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *See Lockett v. Ohio,* 438 U.S. 586, 604 (1978). *Lockett* and its progeny explicitly prohibit states from limiting the sentencer's consideration of any relevant circumstance that could "cause it to decline to impose the death sentence." *McClesky v. Kemp,* 481 U.S. 279 (1987). The Supreme Court's only limitation of evidence in mitigation is that it not be "[irrelevant] evidence concerning other persons, crimes, and events, [that are] completely distinct." *Lockett,* 438 U.S. at 604. This limitation, however, does not disallow evidence on parole because such evidence *is* relevant under *Lockett.*

100. Just as the prosecution is allowed to introduce aggravating evidence of unadjudicated criminal behavior in support of future dangerousness, the Constitution mandates that Mr. Ramdass be allowed to present all relevant mitigating evidence from which the jury may decide to impose a life, rather than death, sentence. Because information about parole is clearly information from which a jury could conclude that a life sentence is appropriate, the court's failure to instruct the jury on Mr. Ramdass' effective parole ineligibility violated his Eighth and Fourteenth Amendment rights.

101. Regardless of its duration, the minimum length of incarceration facing a capital defendant for a life sentence is relevant mitigating evidence that bears on the determination of whether his future dangerousness to society warrants the death penalty. *Clark v. Tansy*, 882 P.2d 527 (N.M. 1994). "[I]n assessing future dangerousness, the actual duration of a defendant's prison sentence is indisputably relevant." *Simmons*, 129 L.Ed.2d at 142. Indeed, it is difficult to conceive of greater assurance of a defendant's nondangerousness to society than the fact he will effectively never be released on parole. *Id.*

102. Mr. Ramdass' effective parole ineligibility was undoubtedly a relevant factor both to rebut future dangerousness and to show why, even if he was a future danger, life imprisonment was an adequate and appropriate punishment. Mr. Ramdass' effective parole ineligibility is evidence from which the jury could have determined that a life sentence was a severe and sufficient punishment for the crime. To make a jury's choice between life and death a meaningful and intelligent one, the jury must know at least the extent of the capital

defendant's minimum period of incarceration before any possibility of parole.

103. Information about parole in a capital case mitigates a sentence of death by providing affirmative evidence that the defendant does not pose a future threat to society. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1985). *Skipper* explicitly recognized that evidence of a defendant's lack of future dangerousness qualifies as mitigation in the penalty phase of a trial. *Id.* Because incarceration may substantially reduce the possibility of a defendant's future dangerousness, information about incarceration is mitigating and may not be excluded from the sentencer's consideration. *Id.* The Court's refusal to instruct the jury on Mr. Ramdass' effective parole ineligibility as mitigating evidence violated Mr. Ramdass' constitutional rights.

104. Mr. Ramdass was denied due process rights by being sentenced to death based on information which he did not have an opportunity to deny or rebut. At sentencing the Commonwealth argued to the jury that Mr. Ramdass was a future danger to society and emphasized that fact that the petitioner had previously been released on "mandatory" parole after serving only four years of a robbery sentence. (TR. 1/29/93 p. 85-86, 130-131.) The false impression created by the Commonwealth over the meaning of a life sentence became clear when the jury questioned the effect of Mr. Ramdass' parole eligibility on a life sentence. The trial court's refusal to instruct the jury accurately on the likelihood of Mr. Ramdass' parole from a life sentence, in light of his effective parole ineligibility, prevented Mr. Ramdass from effectively rebutting that false impression.

105. The United States Supreme Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986), sets forth the constitutional ground for the consideration of parole evidence where the prosecution has relied on evidence of future dangerousness:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant should be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.

Id. at 5 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). *Skipper* was founded on *Gardner's* holding that due process in a capital trial requires that the defendant be afforded an effective opportunity to rebut any aggravating factors which the state posits as a basis for imposing the death sentence. *Skipper*, 476 U.S. at 5 (relying on *Gardner*, 430 U.S. at 362).

106. As the prosecution relied solely on the future dangerousness aggravating circumstance, the issue of whether and when Mr. Ramdass would be released on parole was a critical factor in the jury's deliberations. The fact that Mr. Ramdass effectively would never be eligible for parole was highly relevant rebuttal evidence to an argument of future dangerousness. The need to present effective parole ineligibility information in rebuttal was compounded by the grave misconceptions held by jurors generally with regard to parole.

107. *Skipper* and *Gardner* articulates the concept that irrespective of whether the evidence of the defendant's actions after the crime constitute a mitigating circumstance under the standard set forth in *Lockett v. Ohio*, a capital defendant cannot constitutionally be sentenced to death on the basis of information which he has no opportunity to deny or explain. A capital defendant must be allowed to present information to rebut any type of evidence or argument the Commonwealth produces to prove future dangerousness in the penalty trial. Thus, because the Commonwealth relied entirely on the future dangerousness aggravator, Mr. Ramdass was denied a meaningful opportunity to rebut the Commonwealth's argument with information about the likelihood of his ever gaining his freedom in the future.

108. Assuming, without conceding, that Mr. Ramdass was technically eligible for parole at the time of the jury's question, he was unquestionably statutorily ineligible for parole by the time the trial judge imposed sentence. The trial judge's failure to consider Mr. Ramdass' actual parole ineligibility when imposing the death sentence violated Mr. Ramdass' Eighth and Fourteenth Amendment rights.

109. While a jury's recommendation of death is a necessary precursor to the imposition of a death penalty in Virginia, that sentence may not be imposed until after a presentence report is prepared containing the "history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just." Va. Code § 19.2-264.5. That statute provides that "After consideration of the report, and upon good cause shown, the

court may set aside the sentence of death and impose a sentence of life imprisonment." Va. Code § 19.2-264.5. Thus, the judge must consider all constitutionally mandated factors and must not act arbitrarily when imposing the death sentence.

110. When Mr. Ramdass' death sentence was imposed on April 2, 1993, it is beyond question that he was statutorily ineligible for parole. Even applying the irrational standard for computing parole ineligibility that was announced by the Virginia Supreme Court in *Ramdass2*, Mr. Ramdass became ineligible for parole no later than February 18, 1993. On that date, Mr. Ramdass was sentenced and judgment was entered on the third qualifying felony, the Domino's Pizza robbery. On the same day, Mr. Ramdass also plead guilty and was sentenced for the robbery and firearms violation committed at the Bragg Towers Hotel, a fourth felony qualifying under § 53.1-151.

111. While trial counsel argued and the presentence report reflected Mr. Ramdass' statutory parole ineligibility, the trial judge ignored Mr. Ramdass' parole status. Because the trial judge had already exhibited his awareness of and deference to the then-position of the Virginia Supreme Court that sentence should be imposed without concern to what may happen afterwards, it must be assumed that the trial judge followed what he believed to be the law and excluded information of Mr. Ramdass' parole ineligibility from his own consideration of whether the death sentence was appropriate. In doing so, he denied Mr. Ramdass' Eighth and Fourteenth Amendment right to have the sentencer consider all the relevant facts. Just as he instructed the jury to refrain from considering parole when determining the appropriate sentence,

the trial judge obviously complied with the law as he believed it to be and did not "concern" himself with Mr. Ramdass' parole status.

112. The principles established in *Gardner* and *Skipper* do not distinguish between sentencing jury and sentencing judge. *Simmons v. South Carolina*, 129 L. Ed. 2d at 133. The only reason for informing a jury about parole is so they can give effect to that information. *See generally Penry v. Laynaugh*, 492 U.S. 302 (1989) (defendant entitled to instruction informing jurors how to give effect to mitigation evidence). A judge who knows of a defendant's parole ineligibility but who refuses to give any effect to that information violates the defendant's constitutional rights as surely as a jury that does not give effect because it does not know about parole ineligibility. The judge was constitutionally bound to consider all relevant sentencing information. Based upon the court's articulated view of the law, it is axiomatic that he did not do so. When the trial judge imposed the death sentence, Mr. Ramdass was statutorily ineligible for parole and there was a greatly diminished likelihood that he would commit criminal acts of violence in the future. Without the consideration of Mr. Ramdass' parole status and its effect on the appropriateness of the death sentence, the judge's imposition of the death penalty was arbitrary and unconstitutional.

113. The judge violated Mr. Ramdass' rights to due process by failing to consider his parole ineligibility when actually imposing the death sentence. When state law creates a right which involves a person's liberty, the individual possessing this right is constitutionally entitled to due process with regard to that right. *Krawetz v. Murray*, 742 F.Supp. 304, 305 (E.D. Va. 1990) (Clarke, J.).

As the Supreme Court recognized in *Paul v. Davis*, 424 U.S. 693, 710 (1976).

> there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law and . . . procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Thus, as the Virginia legislature has conferred on capital defendants the right to have the judge determine the appropriateness of the jury's recommended death sentence before that sentence may be imposed, the judge's determination must comply with due process requirements. As demonstrated by his instruction to the jury to refrain from considering parole when determining the appropriate sentence, the judge complied with the law as he believed it to be and presumptively excluded parole eligibility information from his determinations. This failure to consider relevant information rendered the trial judge's determinations, that the death sentence was "appropriate and just" and that "good cause" did not exist to set aside the jury's recommendation of death, unconstitutionally arbitrary. A determination as to whether a death sentence based on Mr. Ramdass' continuing threat to society is appropriate, but which ignores his permanent separation from most of society, is a farce. The judge's exclusion of parole eligibility information effectively annulled the rights conferred on Mr. Ramdass

by Virginia Code § 19.2-264.5 and protected by the Fourteenth Amendment's due process clause.

114. Just as the trial court's failure to consider Mr. Ramdass' parole ineligibility was mandated by the Constitution, the Virginia Supreme Court, as the final arbiter of the death sentence, also was constitutionally bound to consider Mr. Ramdass' parole eligibility.

115. The Virginia Supreme Court's unreasonable failure to set aside Mr. Ramdass' death sentence based on the unconstitutional exclusion of parole eligibility information below violated Mr. Ramdass' Eighth and Fourteenth Amendment rights. Virginia Code § 17-110.1 provides that a death sentence "shall be reviewed on the record by the Supreme Court." Va. Code § 17-110.1A. Without request by any party, the clerk of the circuit court, within ten days of receipt of a transcript must compile the record and transmit it to the Virginia Supreme Court. Va. Code § 17-110.1(B). In addition to any errors specifically noted on appeal, the Virginia Supreme Court "shall consider and determine" whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor [or] is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code § 17-110.1C. Upon review, the court is given specific options to either affirm the sentence, "commute the sentence of death to imprisonment for life" or remand for a new sentencing procedure. The case stands "matured as if an appeal had been awarded to review the conviction and the sentence of death . . . and the enforcement of the sentence of death shall thereby be stayed pending the

final determination of the case by this court." Va. Code § 17-110.1A.

116. The Code and the Rules together require an automatic appeal to the Virginia Supreme Court whether or not the defendant requests one. Even if no assignments of error are made by the defendant, the Supreme Court must consider and determine whether the sentence was influenced by passion, prejudice or other arbitrary factors. *Chabrol v. Commonwealth*, 245 Va. 327, 427 S.E.2d 374 (1993). Upon the automatic review, the Supreme Court can commute the sentence to life imprisonment. Thus, the sentence is "not final" and cannot be carried out until the Virginia Supreme Court completes its review process. This is not a casual step in the process leading to execution. Where the trial judge evaluates the issue of good cause and the presentencing report and, necessarily the issue of future dangerousness, the Virginia Supreme Court is expressly required to consider whether the decision below was "arbitrary."

117. The Virginia Supreme court's unreasonable failure to consider Mr. Ramdass' then-current parole ineligibility, when it "considered and determined" that Mr. Ramdass' death sentence was not "imposed under the influence of passion, prejudice or any other arbitrary factor" violated Mr. Ramdass' Eighth and Fourteenth Amendment rights. When faced with the issue on November 5, 1993, during the first direct appeal, *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993), the Court held that the sentencing jury was not entitled to information of Mr. Ramdass parole status. On remand, in *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994) *cert. denied*, 115 S. Ct. 1800 (1995), the Court, taking

a view of *Simmons* that was inconsistent with established law, held that *Simmons* (1994), did not apply to Mr. Ramdass, as he was not *statutorily* ineligible for parole on the day the jury asked the question on January 29, 1993. (TR. 1/29/93 p. 278.) By focusing on the improper time frame, the Virginia Supreme Court considered the wrong question. Mr. Ramdass became statutorily ineligible for parole on February 18, 1993. As Mr. Ramdass' death sentence was not final until the mandatory appeals process was extinguished, the courts' repeated failures to allow consideration of Mr. Ramdass' effective parole eligibility or his statutory parole eligibility had a substantial and injurious effect or influence on upholding the death sentence. The Supreme Court's failure to consider his parole ineligibility when determining the appropriateness of a death sentence founded upon his future dangerousness to society was arbitrary and unconstitutional. It had a substantial and injurious effect or influence on the sentencing decision.

* * *

EXHIBIT L

IN THE JUVENILE AND DOMESTIC
RELATIONS DISTRICT COURT OF FAIRFAX, VIRGINIA

COURT REPORT

NAME: BOBBY LEE RAMDASS

DOB: 10/19/71 VERIFIED: SCHOOL RECORDS

RACE: MIXED SEX: M

ADDRESS: 3314 LOCKHEED BOULEVARD
#201
ALEXANDRIA, VIRGINIA 22306

CASE:115791-P

MOTHER: PEGGY RAMDASS

FATHER: CHAN DRADTHA RAMDASS

COURT DATE: SEPTEMBER 6, 1985

On August 5, 1985 Bobby Ramdass was found within the court's purview on one charge of grand-larceny, purse-snatching, before Judge Jane P. Delbridge. Judge Delbridge continued this case for preparation of this investigation and report and disposition is set to be heard on September 6, 1985.

This purse-snatching involved Bobby pulling a purse from a woman walking in the vicinity of Beacon Mall Shopping Center. An acquaintance of Bobby's identified him to the police and upon questioning Bobby admitted his involvement. The purse was subsequently recovered with $300 out of $350 originally in the purse, returned to the victim.

Bobby relates he took the purse because he needed money to pay for a moped. The prior owner was putting pressure on Bobby to complete his payments. Bobby indicates he was fully responsible for his actions but a friend (Raymond Taylor CFN: 109077-P) prodded him on. Further, Bobby reflects he would never repeat such a behavior.

Bobby's only prior court contact involved a July 9, 1985 Wreckless Driving Offense. This involved running a red-light on a moped for which Bobby was fined $250 in his absence on July 24, 1985.

Mrs. Ramdass reports Bobby and his brother were both placed in Alexandria City D.S.S. custody in March 1983. Mrs. Ramdass had no place to live at that time. The children returned to Mrs. Ramdass's physical custody in September 1983, however, legal custody remained with D.S.S. until February, 1985. Mrs. Sandra Cory Alexandria Department of Social Services confirmed information reported in an Alexandria Probation Pre-Sentence Investigation on Mrs. Ramdass. These statements indicated " . . . the defendant (Mrs. Ramdass) uses the boys for emotional support and they appear to be more adult than she . . . Mrs. Cory indicated that she does not foresee the defendant ever regaining custody of her children, but they will continue to let her children reside with the defendant unless the situation deteriorates once again." Alexandria D.S.S. closed its case on this family as they were residing in Fairfax County.

Bobby, his brother, and mother share a 2 bedroom garden apartment which they rent for $490 a month. The apartment is modestly furnished and appears neat and clean.

Bobby shares a room with his brother, which likewise is neatly kept and includes a bunk bed, bureau and T.V. Mrs. Ramdass describes the neighborhood as having a negative impact on Bobby because he chooses all the wrong people to associate with. Mrs. Ramdass indicates the apartment lease (in a friend's name) expires on September 1, 1985 and she is uncertain where the family will reside thereafter.

The Ramdass 3314 Lockheed Boulevard address is located in the Eybia Valley of the County, one block from Route One. The apartment is a part of a large garden-apartment complex, in a residential area of other apartments, townhouses and single family homes. The area has a varied population of lower middle income residents and is considered to have a moderately high crime rate. Recreationally there is a school, ball fields, and Huntly Meadows Park across the street from the home. Shopping and bus transportation are available along Route One.

The Ramdass family has been at their present address for one year. Prior to this Mrs. Ramdass reports a history of constantly changing addresses, sometimes moving every few months. Mrs. Ramdass has lived in the Northern Virginia area for 10 years.

Peggy Ann (Glasco Ramdass, mother, was born January 29, 1949 in Washington, D.C. Mrs. Ramdass is one of twenty-one children born to Raymond and Margaret Glasco. A pre-sentence investigation provided by the Alexandria Probation Department described Mrs. Ramdass' childhood as filled with neglect, abuse illegible and runaways. The pre-sentence investigation resulted from Mrs. Ramdass having been found guilty on a charge of

uttering on August 1, 1984 for which she received one year probation. This is Mrs. Ramdass' only prior court record. Mrs. Ramdass reports having completed a tenth grade education, and that she is in special education classes. The Alexandria D.S.S. indicates Mrs. Ramdass has significant intelligence limitations. Medically, Mrs. Ramdass describes her health as not good, largely due to back problems. The Alexandria PSI reflected Mrs. Ramdass' health history included syphillis, [sic] gonorrhea, hemorrhoid problems and being sickly as a child.

Mrs. Ramdass is currently unemployed and receives aid to dependent children. She was last employed at the Days Inn Motel as a maid in October, 1984. Her back problems prevent her from continued employment.

Mrs. Ramdass married Bobby's father, Chan Dradtha Ramdass, in September, 19 [illegible]. The marriage lasted five years. According to the Alexandria PSI, Mr. Ramdass did not believe Bobby was his child and was very physically abusive to Bobby, and his brother, Mark. Mark was born in 1972. (Mark currently lives at home and attends Sandburg Intermediate School). The Alexandria report indicates the family has had no contact with Mr. Ramdass since 1982.

Also according to the Alexandria PSI, Mrs. Ramdass has had two significant relationships since her marriage. One with Mr. Barbebara Sanches, involved physical abuse of both she and her children. The second relationship is a Mr. George Washington. Mrs. Ramdass reports this relationship has been on and off for years, and is currently ongoing.

Mrs. Ramdass describes her relationship with Bobby as a good and communicating one. She reflects that Bobby is both mindful of her instructions and at the same time he will come and go as he pleases. As the oldest child Mrs. Ramdass reports Bobby is very anxious to grow up and have adult privileges without adult responsibilities.

Bobby Ramdass was born on October 19, 1971 in Washington D.C. Bobby is approximately 5 feet, 6 inches tall, weighs 148 pounds, has brown eyes, and black hair. He has a dark tan skin color and a large birthmark on his left leg. According to Mrs. Ramdass Bobby is in good health and experienced a normal childhood development. It would be this counselor's opinion that "normal childhood development" would be difficult to believe in light of Mrs. Ramdass unstable background.

Educationally Bobby will be repeating the seventh grade at the new Sandburg Intermediate School. His final grades of June 1985 were as follows:

History	D	Math	F
Art	C	Life Science	D
Art Advanced	F	Experiential Tech	D
English	F	H-PE	F

However, these grades are in contrast to educational records which indicate Bobby has average academic ability. According to Bobby's guidance counselor Bobby is a pleasant young man but he did have a series of minor disciplinary suspensions. The suspensions involved

horseplay and inappropriate methods of seeking others' attention.

Bobby indicates he generally likes school and has many friends. He admits, however, to getting in fights because he was a "new kid" in the school. Bobby's favorite class is English and his least favorite is math. He believes his poor grades last year were due to family problems. He claims he was worried about there being enough money and food in the house. Currently Bobby relates this is not a problem.

In his free time Bobby likes to spend time with friends, go swimming, and participate in sports. His future goal is to be a police officer, because he likes excitement and he has knowledge of the streets. Bobby admits to trying alcohol but not to any regular use.

Family relationships are described by Bobby as satisfactory. He views his mother as a nice and fair person, who tends to be a little bit strict. Bobby relates he generally gets along well with his brother. Regarding his mother's boyfriend, Bobby relates his mother follows Mr. Washington's instructions too often, which Bobby finds aggravating.

Bobby Lee Ramdass, 13 years old, is before the court for disposition of one charge of grand-larceny, purse-snatching. This is Bobby's second court contact in two months' having been found not innocent of wreckless driving of a moped Bobby did indicate to this counselor he truly understands his behavior was unacceptable.

Bobby's family background appears to be an [sic] extremely unstable and chaotic. There is often times uncertainty as to how basic food, clothing and home needs will be met. Additionally there is a history of physical abuse and a time

when physical custody was taken by D.S.S. Further, Mrs. Ramdass, is well meaning, has significant physical, emotional, and intellectual limits.

Academically Bobby appears to have average ability. It is only in the [illegible] that Bobby's grades have been below average and failing. Behaviorally described as a pleasant student yet there had been a series of attention suspensions during the last school year.

It is rather surprising in this counselor's opinion that Bobby's school community behaviors are not a great deal worse than they currently are. For this reason probation as a support system and consequence for Bobby would be entirely appropriate. Additionally a short period of community service would help Bobby better understand the value of property. Also while on probation, this case would be monitored for possible referral to the Department of Social Services.

It is recommended that Bobby Ramdass be placed on supervised probation, for a period of one year. Further that he should be ordered to complete 75 hours of community service.

Respectfully Submitted,

/s/ Gerald M. Smollen
GERALD M. SMOLLEN
Probation Officer

/s/ David G. Rathbun
DAVID G. RATHBUN
SUPERVISOR,
SOUTH COUNTY [Illegible]

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GMS/lsf

(7)

Supreme Court, U.S.
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No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, Director,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

Counsel for Petitioner

MARK J. EARLEY
Attorney General of
Virginia

KATHERINE P. BALDWIN
Assistant Attorney General
Counsel of Record
Office of the Attorney
General
900 East Main Street
Richmond, VA 23219
(804) 786-4624

Counsel for Respondent

[Additional Counsel Listed On Inside Cover]

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P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

Of Counsel

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BOBBY LEE RAMDASS,

Petitioner,

v. **2:96CV831**

RONALD J. ANGELONE, Director of the Virginia Department of Corrections,

Respondent. **[Filed Feb. 27 1993]**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 28 of the Rules of the United States District Court for the Eastern District of Virginia.

I. STATEMENT OF THE CASE

A. Background

Petitioner is before the Court seeking a writ of habeas corpus as a result of his convictions in the Circuit Court of Fairfax County, Virginia, of capital murder, robbery, and use of a firearm in the commission of a felony, all of which occurred in the course of an armed robbery on September 2, 1992, during which Mohammad Z. Kayani, a convenience store clerk, was slain. Petitioner was tried

in January, 1993, pled guilty to the robbery and was found guilty of the murder and use of a firearm charges following a jury trial. Petitioner was sentenced to death for the murder and to terms of imprisonment for the remaining offenses. All sentences imposed by the jury were ordered by the Court on April 2, 1993.

B. Facts

The Court's decision is driven by the facts set forth in the record. A significant portion of the factual summary which follows has been taken from the opinion of Virginia Supreme Court Justice Whiting denying petitioner's claims on direct appeal. *Ramdass v. Commonwealth*, 437 S.E.2d 566, 568 (Va. 1993). Additional matters relevant to the issues before the Court have been added as appropriate, both here and in the body of the opinion, to complete the context in which the petition has been considered.

At the outset, it is important to note that the trier of fact may not impose the death penalty in the absence of a finding beyond a reasonable doubt that (1) "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society," or (2) "that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code § 19.2-264.4(C).

Following petitioner's conviction, but prior to the penalty phase, the prosection [sic] conceded that it was not entitled to proceed under the second part of the statute (vileness) but only to "proceed[ ] under the alternative theory of future dangerousness. . . . " (1/29/93 Tr. at 8.)

Between August 25, 1992, and September 2, 1992, petitioner and several associates, two of whom testified at his trial, committed four armed robberies. During one of the robberies, petitioner pistol-whipped the night clerk at the hotel being robbed; the following night, he shot a cab driver in the head, leaving him to die. The cab driver lived to testify at trial. Two days later, the predicate offenses occurred.

During the night of September 1, 1992, and early morning of September 2, 1992, petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including petitioner, decided that they would rob persons at a 7-Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7-Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed,

took the customers' wallets, money from the cash register, cigarettes and lottery tickets from the store's stock, and Kool-Aid.

After petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f – – head off.[1]" *Ramdass*, 437 S.E.2d at 568. At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206-07.) Immediately thereafter, Singh, standing behind petitioner, saw petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211-12.) Testifying about the precise moment of the shooting, Singh stated that petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after petitioner shot Kayani, Ramirez returned from a back room in the store. Ramirez saw petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.) Later, Ramirez heard petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.) Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged petitioner to "[c]ome on." (*Id.* at 146.) However, petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the

[1] Another employee of the 7-Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

clicking of the gun as petitioner left. (1/27/93 Tr. at 125, 129-30.)

When they got in the car, Ramirez heard petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, petitioner told Ramirez, "[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146-47.)

Singh, a co-owner of the gun with petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 247.) Mason testified that the 9 millimeter cartridges petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250-51.) Mason further testified that when the muzzle was pointed up, cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

The Commonwealth, in seeking the death penalty, only relied upon the "continuing serious threat to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by petitioner and threatened with a gun

during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by petitioner. At the time of trial, petitioner had been convicted of the Pizza Hut crimes and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7-Eleven crimes, petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

While all of the above described offenses occurred within a week of the murder of Kayani, the jury was also made aware of petitioner's troubled history.

The record reveals that the jury was informed of petitioner's extensive juvenile record, beginning in 1985, with a purse snatching, for which he received probation, (1/29/93 Tr. at 198-99); theft of a moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he was sentenced to Southampton prison as an adult, (1/29/93 Tr. at 17-18, 202). The jury also learned that petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149-51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85-86, 202).

To offset the elaborate prosecution effort to establish petitioner's future danger to society, the defense presented evidence of a bleak, abusive, unstructured childhood, during which petitioner was physically and emotionally abused, raised in conditions of severe deprivation and in the complete absence of any positive guidance.

Petitioner's brother, Mark Ramdass, was called on petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and try to keep him out of trouble. (1/29/93 Tr. at 103-05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She prepared the probation report, following petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when petitioner was born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges, and confirmed that she twice lost custody of her children for neglect. (*Id.* at 227-28.) She described how petitioner was physically abused by a boyfriend and how she taught petitioner to defend himself. She admitted contracting venereal disease from another live-in boyfriend and admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232, 228-30.)

Finally, the following exchange took place between defense counsel and petitioner's mother:

Q. Do you realize that Bobby could be executed?

A. Yes.

Q. How do you feel about that?

A. I don't know.

Q. He's your son. How do you feel about the fact that he could die?

A. I just don't know. I just – I'm not feeling anything right now.

. . . .

Q. Did you ever teach Bobby not to cry?

A. Yes.

Q. Did you teach him not to show any emotion?

A. Yes, I taught him that, too.

Q. Did you show any emotion?

A. Not lately, no, not for a long time.

(4/2/93 Tr. at 10-11).

The factual issues addressing petitioner's future threat to society and the mitigating factors offered to explain, in part, petitioner's conduct were thoroughly explored.

C. Procedural History

On September 2, 1992, petitioner murdered Muhammad Kayani, a clerk employed at a 7-Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7-Eleven robbery and murder. On September 21, 1992, petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued, and the matter came on for trial on January 26, 1993. At trial, petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictments, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidential portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony, for which petitioner was sentenced to four years in the penitentiary. Following the jury verdict, the court found petitioner guilty with respect to Count II, robbery, finding on the record that petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, *sua sponte*, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. However, sentencing was continued from that date until April 2, 1993, at which time the court imposed judgment upon petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict, for use of a firearm in the commission of a felony; and life for the robbery, incident to petitioner's plea of guilty.

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding, they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278), to which the court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under

the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.)

Trial counsel pursued a direct appeal on behalf of petitioner, assigning the following errors:

> 1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
>
> 2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
>
> 3. The Trial Court erred in granting an extended reasonable doubt instruction.
>
> 4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*, tried in the same circuit and approved by the Virginia Supreme Court.
>
> 5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.
>
> 6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.
>
> 7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B-S" which instructed the jury that they must

all agree that the Defendant would be a future danger.

8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E-S" which instructed they [sic] jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.

9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation §19.2-264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.

10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.

11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.

12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the

Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.

13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to *voir dire* the jury regarding

specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for *in-camera* requests for expert witnesses in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7-11; as to the specific location of Mr. Ramirez on dates

preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and ruled that where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons. Ramdass v. Virginia*, 512 U.S. 1217 (1994).

As presented by petitioner to the Supreme Court of Virginia on remand, the sole issue in *Simmons* was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that *Simmons* was not raised in the trial court; that petitioner was ineligible for parole and *Simmons*, therefore, did not apply; and that *Simmons* was irrelevant because the sentencer can always consider parole ineligibility.

On November 4, 1994, the Supreme Court rejected petitioner's claim, found that petitioner was ineligible for parole, and concluded that *Simmons* did not apply. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth.

On August 30, 1995, petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper *voir dire*, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a *Simmons* error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

An *ex parte* motion for expert assistance and an investigator was denied on January 19, 1996, and the habeas petition was denied on March 18, 1996, without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to petitioner, and that the trial court denied petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the *Simmons* claim is well articulated. The petition for rehearing was denied June 7, 1996.

Following denial of the petition for rehearing, the Circuit Court of Fairfax County set petitioner's execution for August 28, 1996.

On June 25, 1996, a motion by petitioner to stay execution was filed, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, petitioner moved for a stay of execution and for leave to proceed *in forma pauperis*, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

On February 14, 1997, the present petition was filed. On March 11, 1997, an amended petition was filed, and that is the pleading upon which all further actions have

been based. The amended petition presents, in the broadest possible terms, the *Simmons* issue; claims of denial of effective assistance of counsel; claims based on the alleged denial of a mental health expert and other experts; the denial of exculpatory material sought from the prosecution; the absence of due process because the Virginia sentencing statute is unconstitutional on its face; that the death penalty statute is unconstitutional on its face; and that prejudicial errors of a constitutional dimension were committed during the penalty phase.

A response to the petition and a motion to dismiss were filed on behalf of the respondent on April 28, 1997.

On June 3, 1997, petitioner's response to the motion to dismiss was filed.

On June 26, 1997, the respondent's reply brief was filed.

The issue are [sic] now ripe for adjudication.

D. Grounds Raised

Petitioner asserts many claims in support of his request for relief under 28 U.S.C. § 2254. For ease of identification in addressing the numerous issues in the body of the opinion, the Court has placed in parentheses the letter and/or number designation used in the petition next to the Court's numbering. Subparts of major topics are presented selectively, based upon whether the subpart is simply assumed to be an element of the principal claim, e.g. A.2.a. (the Virginia Supreme Court rejection of

the *Simmons* claim on remand was *ultra vires*) or constitutes a separate and independent claim, e.g. C.5.a. (failure of trial counsel to conduct adequate *voir dire*).

The issues presented in Section III of the petition are:

1. (A) The Court's failure to allow consideration of petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth Amendments.

2. (B) Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

3. (C) Petitioner was denied effective assistance of counsel.

   a. (C(2)) Defense counsel's trial "strategy" was inadequate.

   b. (C(2)(a)) Counsel unreasonably advised petitioner not to testify.

   c. (C(2)(b)) Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position.

   d. (C(2)(c)) Trial counsel failed to challenge the testimony of the Commonwealth's medical examiner.

   e. (C(2)(d)) Trial counsel failed to adequately cross-examine the prosecution's "firearms identification" expert.

   f. (C(2)(e)) Expert assistance to educate counsel was neither sought nor obtained.

4. (C(3)) Trial counsel did not object to co-defendants' testimony about his sentence for the murders.

5. (C(4)) Trial counsel failed to establish petitioner's parole ineligibility by failing to continue the case for a long enough time to establish the requisite prior convictions.

6. (C(5)) Additional reasons why assistance of trial counsel was ineffective:

   a. (C(5)(a)) Trial counsel failed to conduct adequate *voir dire*.

   b. (C(5)(b)) Trial counsel effectively conceded the only aggravating factor in the penalty phase.

   c. (C(5)(c)) Trial counsel failed to prepare adequately for the penalty phase of the capital murder trial.

7. (D) Petitioner was unreasonably and unfairly deprived of the assistance of an investigator and a doctor.

8. (E) Petitioner was unreasonably denied the opportunity to proceed *in camera* with regard to experts.

9. (F) Petitioner was denied exculpatory material by the prosecution.

10. (G) The Virginia death penalty statutes violate the Sixth, Eighth, and Fourteenth Amendments.

11. (H) Petitioner was denied his right of confrontation in violation of the Sixth Amendment of the United States Constitution.

12. (I) Trial counsel violated petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

13. (J) The Virginia Supreme Court arbitrarily and unreasonably performed its mandatory review of petitioner's death sentence in violation of the Eighth and Fourteenth Amendments.

14. (K) Virginia's capital murder sentencing statute is unconstitutional.

The following chart correlates the grounds alleged in the federal habeas corpus petition with the corresponding claims in the state habeas corpus petition.

Federal Habeas Claims Section III of the Petition		State Habeas Claims	
Claim 1. (A)	p. 23	Claim IV.C.13	p.29
Claim 2. (B)	p. 53	Not raised in same form	
Claim 3. (C)	p. 64	Claim IV.A.	p. 3
Claim 3.a. (C(2))	p. 66	Not raised	
Claim 3.b. (C(2)(a))	p. 68	Claim IV.A.20	p. 15
Claim 3.c. (C(2)(b))	p. 69	Claim IV.A.20	p. 15
Claim 3.d. (C(2)(c))	p. 70	Claim IV.A.8 & 9	pp. 9,10
Claim 3.e. (C(2)(d))	p. 73	Claims IV.A.13, 16, 17, 18	pp. 12, 13, 14
Claim 3.f. (C(2)(e))	p. 76	Claims IV.A.5, 7, 15	pp. 6, 8, 13
Claim 4 (C(3))	p. 81	Claim IV.A.12	p. 12
Claim 5 (C(4))	p. 82	Not raised	
Claim 6.a. (C(5)(a))	p. 86	Claim IV.A.2	p. 4
Claim 6.b. (C(5)(b))	p. 92	Claim IV.A.21	p. 15
Claim 6.c. (C(5)(c))	p. 94	Claim IV.A.23	p. 16
Claim 7 (D)	p. 95	Claim IV.C.14	p. 30
Claim 8 (E)	p. 102	Not raised in habeas corpus petition/ raised on direct appeal	
Claim 9 (F)	p. 117	Claims IV.B.1 and IV.C.3	p. 17, 23
Claim 10 (G)	p. 121	Not raised in h/c pet/raised on direct appeal	
Claim 11 (H)	p. 124	Not raised in h/c pet/raised on direct appeal	
Claim 12 (I)	p. 126	Claim IV.A.19 and IV.C.9, 12	pp. 14, 26, 27
Claim 13 (J)	p. 132	Claim IV.D	p. 31
Claim 14 (K)	p. 139	Not raised in h/c pet/raised on direct appeal	

*Some of the claims are in different form than in the federal petition, but the issue was preserved.

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II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Dismiss

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint is construed in the light most favorable to the plaintiffs and their allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The complaint should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1993); *Bruce v. Riddle*, 631 F.2d 272, 273-74 (4th Cir. 1980). The courts must construe the complaint liberally in favor of the plaintiffs, even if recovery appears remote and unlikely. *See Jenkins*, 395 U.S. at 421. In ruling on a 12(b)(6) motion, the court primarily considers the allegations in the complaint but may consider attached exhibits and documents incorporated by reference. *See Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Wolford v. Budd Co.*, 149 F.R.D. 127, 129-32 (W.D. Va. 1993).

B. Standard of Review in Habeas Corpus Proceedings.

In 1996, Congress enacted, and the President signed into law, the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat, 1214 (April 24, 1996)

(hereinafter "AEDPA"). The AEDPA provided habeas reform in both capital and noncapital cases. Section 107 of the AEDPA added a new chapter to Title 28 establishing special procedures in capital cases. 28 U.S.C. §§ 2261-2265. Among them was the establishment of a six-month statute of limitation for the filing of a petition and a further limitation within which to act on any such application.

This Court has previously determined that section 107 of the AEDPA does not apply in this case because "on the date Ramdass's state habeas counsel was appointed, Virginia was not in compliance with the requirements of the AEDPA because it did not have a mandatory appointment mechanism," nor did it meet the federal statutory requirements for compensation and payment of reasonable litigation expenses for counsel appointed to indigent death row inmates and only arguably met the competency standards. *Ramdass v. Netherland*, 2:96CV831, Order of December 6, 1996. Similar rulings have been arrived at in *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996); *See also Satcher v. Netherland*, 944 F. Supp. 1222, 1238 (E.D. Va. 1996); *Breard v. Netherland*, 949 F. Supp. 1255, 1261-62 (E.D. Va. 1966).

However, section 104 of the AEDPA, which amends 28 U.S.C. § 2254, governing noncapital habeas claims, does apply. As the Supreme Court noted in *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 [28 U.S.C. § 2241 *et seq.*] only to such cases as were filed after the statute's enactment. . . . " *Id.* at 2063. Justice Rehnquist goes on to say "[w]e read . . . section 107(c) . . . as indicating implicitly that the amendments to chapter 153

were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.*

In *Mu'Min v. Pruett*, 125 F.3d 192 (4th Cir. 1997) and *O'dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) the Fourth Circuit declined to apply the provisions of the AEDPA because each habeas petition was filed prior to the effective date of the statute. Thus, litigants in those cases were entitled to the benefit of the pre-AEDPA standards.

Petitioner, however, is governed by "the considerably more demanding standards . . . imposed on habeas petitioners" by the AEDPA. *O'dell*, 95 F.3d at 1255 n.36.

As applied to petitioner, 28 U.S.C. § 2254(d) reads

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The language of the statute is important; the legislative "and's" and "or's" must be clearly understood because for petitioner to prevail, he must establish that his claim was adjudicated on the merits in state court

proceedings and resulted in a decision and that the decision was contrary to or involved an unreasonable application of clearly established federal law; or that his claim was adjudicated on the merits in a state court proceeding and resulted in a decision, and the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Because many legal conclusions arise out of a specific factual context, 28 U.S.C. § 2254(e)(1) is particularly important:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant *shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.*

28 U.S.C. § 2254(e)(1) (emphasis added).

To underscore the deference intended to be accorded the factual findings of a state court, the statute goes on to provide that when an applicant has failed to develop the factual basis of a claim in state court proceedings, an evidential hearing "shall not" be conducted unless a petitioner establishes that the claim relies on a new, retroactively-applied constitutional rule, that the fact could not be previously discovered with due diligence or that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

C. Petitioner's Claims are Exhausted and are Subject to Federal Review.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(I) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement dictates that a petitioner must first present his claims for relief to state courts before a petition for habeas corpus may be granted by the federal courts. A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings. *Pitchess v. Davis*, 421 U.S. 482 (1975); *Picard v. Conner*, 404 U.S. 270, 275-76 (1971). *See also Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Satcher v. Pruett*, 126 F.3d 561, 573 (4th Cir. 1997); *Mu'Min v. Pruett*, 125 F.3d 192, 197-98 (4th Cir. 1997); *Duncan v. Henry*, 115 S.Ct. 887, 888 (1995).

Not all of petitioner's claims were raised on direct appeal or in his state habeas action. However, for purposes of the exhaustion requirement, all of petitioner's claims are deemed to be exhausted because Virginia statutes, rules, and case law preclude raising issues for the first time, with certain notable exceptions (i.e. ineffective assistance of trial counsel) in a habeas proceeding.

Because any claims presented by petitioner which were not raised on direct appeal are barred by the contemporaneous objection requirement of Rule 5:25, Rules of the Supreme Court, and applied through *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), and because any issues not raised in petitioner's original state habeas petition may not be considered in any subsequent petition, the claims are considered both exhausted and procedurally barred. Va. Code Ann. § 8.01-654(B)(2); *Gray v. Netherland*, 116 S.Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990); *Ferguson v. Cox*, 464 F.2d 461, 463 (4th Cir. 1972).

Respondent concedes that "[a]ll . . . claims are exhausted within the meaning of 28 U.S.C. § 2254(b) . . . ," and the Court agrees.

D. Some of Petitioner's Claims are Procedurally Defaulted

Under Virginia law, a claim included in a petition for habeas corpus will be barred if an objection was not raised at trial and the objection presented on direct appeal. In *Coppola v. Warden of Virginia State Penitentiary*, 282 S.E.2d 10 (Va. 1981), the Supreme Court of Virginia held that to preserve an issue for appeal, and for a habeas corpus proceeding, the issue must be timely objected to at trial. Rule 5:25 of the Supreme Court of Virginia states the contemporaneous objection rule: "Error will not be sustained to any ruling of the trial court or the commission

before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling. . . . " Va. S.Ct. R. 5:25.

The Supreme Court has stated that: "Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding." *Smith v. Murray*, 477 U.S. 527, 533 (1986). The Fourth Circuit has held that if a claim is procedurally barred in Virginia courts because it was not brought on direct appeal, it will also be barred in the federal system. *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990).[2] In *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), the court held that the failure of an inmate to directly appeal his conviction to the Supreme Court deprives

> the Virginia Supreme Court of the opportunity to rule on the merits of his claims. We consider such failure to constitute a violation of the requirements of Rule 5:21, which applies to appeals of all Virginia cases, civil or criminal, and conclude that such violation constitutes a procedural default sufficient to preclude federal court review of the merits. . . .

Id. at 1502 (*citing* Va. S. Ct. R. 5:21, *repealed and reinstated in substantially similar form as*, Va. S.Ct. R. 5:17, 5:25).

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[2] The court in *Bassette* relied on Virginia Code section 8.01-654 (B)(2). *Bassette*, 915 F.2d at 936. Section 654 (B)(2) states: "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01-654 (B)(2) (Michie 1992).

In *Slayton*, the Virginia Supreme Court stated a similar proposition: "[a] petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." *Id.* at 682. The Supreme Court of the United States addressed the same issue in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court held that the doctrine of procedural default will bar a federal habeas petition when a prisoner fails to meet a state procedural requirement. *Id.* at 750. Speaking for the Court, Justice O'Connor said:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. . . . We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Id. at 750.

More recently, the issue has been addressed in *Gray*; *Satcher v. Pruett*, 126 F.2d 561 (1997); and *Mu'Min*, 125 F.3d 192 (4th Cir. 1997).

In *Gray v. Netherland*, 116 S.Ct. 2074 (1996), the Court, addressing a *Brady* claim, raised neither on direct appeal nor in the original state habeas corpus proceeding, stated:

> [T]he procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.

In Virginia, "[n]o writ [of habeas corpus ad subjiciendum] shall be granted on the basis of any allegation that facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01-654(B)(2) (1992). Because petitioner knew of the grounds of his *Brady* claim when he filed his first petition, § 8.01-654(B)(2) precludes review of petitioner's claim in any future state habeas proceeding. Because petitioner makes no attempt to demonstrate cause or prejudice for his default in state habeas proceedings, his claim is not cognizable in a federal suit for the writ.

> *Id.* at 2080-81 (citations omitted).

In *Mu'Min*, petitioner sought to avoid the burden of procedural default by arguing that the rule in *Slayton* does not preclude federal consideration because it is not independent of federal law and that even if *Slayton* constitutes an adequate and independent ground for rejecting his claims, they were, nevertheless, implicitly considered and rejected by the Supreme Court of Virginia during its mandatory review of his death sentence. Both arguments were rejected.

The court noted that *Slayton* has been relied upon in the Fourth Circuit, e.g. *Bennett v. Angelone*, 92 F.3d 1336,

1343 (4th Cir. 1996) and is regularly cited in Virginia opinions. *Mu'Min*, 125 F.3d at 197.

Moreover, the federal court is required to dismiss a procedurally defaulted claim absent a showing of justifiable cause resulting in actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). As the Fourth Circuit stated in *Satcher*, in order for a procedurally defaulted claim to be considered, petitioner "must demonstrate that the error worked to his 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.' *Id.* at 572, citing *Murry* [sic] *v. Carrier*, 477 U.S. 478, 494 (1986); *Poyner v. Murray*, 964 F.2d 1404, 1425 (4th Cir. 1992). Petitioner has not made a showing of justifiable cause for his failure to appeal any of the defaulted issues to the Supreme Court of Virginia, either on direct appeal or in his original habeas petition. Therefore, the issue of actual prejudice need not be addressed.

Respondent asserts that numerous claims by petitioner are procedurally defaulted. The Court concurs in some instances, but not in others, and accordingly, each of respondent's assertions will be dealt with individually.

The Court finds that Claim 9 is procedurally defaulted, to the extent that it is founded upon refusal of the trial court to order production of a co-defendant's prior inconsistent statement or upon the premise of prosecutorial misconduct in the denial of allegedly exculpatory material. No such issues were raised on direct appeal. Instead, all direct appellate claims were addressed in the context of trial court error (denial of polygraph information for impeachment purposes, denial of material regarding future dangerousness, and refusal

to examine prosecutorial work product, in the form of witness statements, *in camera*).

The claim of prosecutorial misconduct was first raised in the state habeas petition (Claim B(1)) and presented the issues of nondisclosure of a prior inconsistent statement by a co-defendant, and the purported failure to reveal the location at which a bullet was found or show trial counsel a particular photograph of the murder scene.

Both state habeas claims were rejected – the claim of prosecutorial misconduct by application of *Slayton*, and the claim of trial court error by application of *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970) ("[a]bsent a change of circumstances, previous determination of the issues by either state or federal courts will be conclusive." *Id.* at 274. Any objections founded upon purported prosecutorial misconduct should have been made at the time of or during the course of the trial, and presented to the Virginia Supreme Court on direct appeal. The application of *Slayton* to these claims in the state habeas proceeding is consistent with prior judgments by the court. The present claim continues petitioner's search for relief, based upon polygraph test results for one of the co-defendants, and again raises the issue of the trial court's failure to review the prosecution's file *in camera*. Polygraph material is not accessible under the *Brady* banner, when the results are inadmissible at trial, *Wood v. Bartholomew*, 516 U.S. 1, 10 (1995), and Virginia law prohibits use of polygraph results for impeachment purposes under any circumstances. *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986).

The portion of Claim 9 addressed to the refusal of the trial court to review the prosecution's file *in camera* to determine the presence of exculpatory material is addressed later in this opinion.

Claim 13, the sufficiency of the Virginia Supreme Court proportionality review, was dismissed by the Supreme Court of Virginia on the basis of *Slayton*. However, the issue of the appropriateness of the death penalty, and whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, or whether it was excessive or disproportionate to a penalty in similar cases was addressed on direct appeal; the subject of the Supreme Court's original decision, *Ramdass v. Commonwealth*, 426 Va. 413, 426-27 (1993); and resubmitted in the state habeas corpus proceeding. Because *Slayton* addresses both the issue of objections not timely made and the use of a petition for writ of habeas corpus as a substitute for an appeal or writ of error, and because the Virginia Supreme Court was entitled to rely upon its own decision addressing the issue of whether the sentence was proportional and free of inflamed judgment by the jury, this Court finds that the issue has been appropriately preserved and is not procedurally defaulted.

Respondent alleges that Claim 1, the *Simmons* issue, has not been raised and is, therefore, procedurally defaulted. The Court disagrees. Regardless of the precise form or nature of the argument, there is one issue which has been preserved throughout this case, since it surfaced in the capital sentencing phase of the trial, and that is whether the sentencing jury was entitled to know petitioner's parole eligibility status. The issue was presented on direct appeal, and ruled upon by the Virginia Supreme

Court. *Ramdass*, 246 Va. at 426. *Certiorari* was granted by the United States Supreme Court on the sole issue of whether the jury was entitled to know petitioner's parole eligibility status when the Commonwealth relied upon the sole aggravating factor of future dangerousness. The matter was subsequently addressed by the Virginia Supreme Court and petitioner's claim rejected on the sole ground that petitioner was parole ineligible because he had not received the requisite number of convictions. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994). The claim was renewed in the state habeas proceeding as Claim C(13) and rejected under the rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970). The Court finds that this claim is not procedurally defaulted, and it will be addressed on the merits.

Claim 2, denial of the constitutional right to the assistance of a mental health expert, is procedurally defaulted. No issue addressing denial of the "right to the assistance of a mental health expert" was presented on direct appeal. In the state habeas proceeding, trial counsel were accused of being ineffective for failing to secure a mental health expert who would assist in petitioner's defense, (Claim A(4)), but a constitutional claim based on the purported failure to make such assistance available was not made. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). The present claim constitutes an attack upon the alleged biases of the expert appointed by the court to assist in the preparation of such mental health issues as might be present. However, counsel for petitioner have not presented the issue in any context fairly raised in either the trial court or the Virginia Supreme Court. Absent a showing of cause and prejudice for petitioner's failure to assert

the claim in state court, he is not entitled to do so now. *Slayton; Mu'Min v. Pruett*, 125 F.3d 192, 196 (4th Cir. 1997). The claim is procedurally defaulted.

Claim 3(a), denial of effective assistance of counsel because of an inadequate defense strategy, is procedurally defaulted. The claim was not raised in the state habeas corpus action, the first occasion on which it could have been raised, and it may not now be presented for the first time.

Likewise, Claim 3(b), alleging that petitioner was denied the effective assistance of counsel because of trial counsel's advice to petitioner not to testify, is procedurally defaulted. In the state habeas petition, habeas counsel alleged that trial counsel failed to put on evidence, (Claim A(20)), but in the course of presenting the claim stated only that trial counsel "met with petitioner and talked him out of testifying," without alleging that such action constituted ineffective assistance of counsel. This Court is not required to assume that the language state habeas counsel selected was to be viewed in the pejorative sense. The current claim asserts that trial counsel were negligent, and that they "unreasonably recommended that [petitioner] not testify." (Pet. at ¶ 158.) That is a marked departure from the state habeas claim and is, therefore, procedurally defaulted. *Mu'Min; Duncan v. Henry*, 513 U.S. 364, 366 (1995) (*per curiam*).

Respondent asserts that Claim 3(f), ineffective assistance of counsel by virtue of trial counsel's failure to obtain experts to assist in the defense of the case and rebut prosecution experts, is procedurally defaulted as to claims pertaining to the location of the bullet. The Court

agrees. However, the other claims were fairly raised in the state habeas corpus petition and rejected by the Virginia Supreme Court on the merits. The issues have been preserved for appeal.

Respondent asserts that Claim 5, ineffective assistance of counsel for failing to establish parole ineligibility by failing to request rescheduling of the trial and by failure to challenge the determination that petitioner was not eligible for parole, are procedurally defaulted. The Court agrees, as to the former issue, but disagrees as to the latter. Neither issue was raised in the state habeas proceeding in the context of ineffective assistance of counsel, even though at the time the state habeas petition was filed, the case had been remanded to the Virginia Supreme Court by the United States Supreme Court and dismissed on a supplemental opinion, *Ramdass v. Commonwealth*, 248 Va. 518 (1994), on the grounds that petitioner was not eligible for parole. Thus, both of the issues raised in the current proceeding were known to state habeas counsel, and their failure to raise the ineffective assistance of counsel claim results in the claim being procedurally defaulted. However, the *Simmons* issue was expressly preserved.

Respondent asserts that Claim 6(a), alleging ineffective assistance of counsel via inadequate *voir dire* prior to empaneling of the jury, was not raised. However, the Court finds that matter was addressed in the state habeas petition, Claim A(2), and dismissed on the merits. Where the claim is that counsel was ineffective because of an inadequate *voir dire* examination, the fact that the tenor of the argument may change does not render the matter procedurally defaulted. Current counsel are simply not

bound to adhere to the arguments of state habeas counsel which have already been rejected by one tribunal. The state was put on notice, the issue was preserved, and the claim is not procedurally defaulted and will be addressed on the merits.

Respondent asserts that Claim 10, addressing the issue of the constitutionality of Virginia's death penalty sentencing statutes, has not been raised, but the Court finds otherwise. The issues were raised on direct appeal in the context of the adequacy of the proportionality review in the state habeas corpus action, and the Eighth and Fourteenth Amendment issues arising out of the Virginia death penalty have been properly preserved and will be considered on the merits.

Finally, respondent alleges that Claim 12, the admission of unadjudicated misconduct in the penalty phase in violation of petitioner's constitutional rights, was not raised in the state court. However, the matter was raised on direct appeal and addressed in the first Virginia Supreme Court opinion, *Ramdass*, 246 Va. at 418; raised in the state habeas petition and dismissed under the rule in *Hawks*, (Claim C(12)); and preserved for consideration by this Court. The claim is not procedurally defaulted.

The remainder of the report and recommendation will be addressed to the claims which are not procedurally defaulted.

E. Claims Addressed on the Merits.

1. General

Judge Wilkinson, in the course of addressing numerous purported constitutional claims in a death penalty case said: "It is becoming all too commonplace to charge even diligent counsel in the midst of difficult circumstances with the adverse outcome in a capital case." *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991). The case involved a petitioner who shot his girlfriend in cold blood; ransacked her house and stole expensive jewelry; and before leaving, knotted a scarf around the decedent's neck and pulled her unconscious body to a door where he hung her by the scarf from the door knob. *Id.* at 1358. The autopsy established that her death was a combination of the gunshot wound to the head and suffocation as a result of the hanging. *Id.* The complaints in that case ran the gamut: ineffective assistance of counsel, instructional errors, and a biased jury. The tenor of the comment could be modified to state that it has become commonplace, in every capital case, to assume that some error of constitutional dimension has lead [sic] to a decision that the defendant is guilty of the capital offense and that the conduct and background of the guilty party justifies the death penalty. Judge Wilkinson, and other jurists called upon to deal with death penalty cases, find their experience to be otherwise.

It is, therefore, appropriate to again turn to the language of Judge Wilkinson in *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), where he stated:

> Criminal defendants in this country are entitled to a fair, but not a perfect trial. "[G]iven the

> myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," *United States v. Hasting*, 461 U.S. 499, 508 (1983) and the Constitution does not demand one. This focus on fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting "public respect for the criminal process." *De Lawrence v. Van Arsdale*, 475 U.S. 673, 681 (1986).

Sherman at 1137.

The statement is made in the context of the language of *Arizona v. Fulminante*, 499 U.S. 279 (1991), in which the Supreme Court noted "that a constitutional error does not automatically require reversal of a conviction," noting that "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."[3] *Id.* at 306. The more difficult issue has always been what standard to apply in determining whether an error is harmful. Judge Wilkinson addressed the error in *Sherman*, using the phrase "structural errors" to describe errors so severe as to render a trial inherently unfair and thus, not subject to a harmless error analysis, the only correct analysis to be applied to the claims now before the Court.

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[3] Both the Supreme Court in *Fulminante*, 499 U.S. at 306-07, and Judge Wilkinson in *Sherman*, 89 F.3d at 1137, catalogued errors deemed to be constitutional in scope but harmless in the effect on the outcome of trial.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court had to choose between competing standards for harmless error analysis. In conflict was the standard articulated in *Chapman v. California*, 386 U.S. 18 (1967), necessitating a finding that an error "was harmless beyond a reasonable doubt," *id.* at 24, juxtaposed against *Kotteakos v. United States*, 328 U.S. 750 (1946), in which the Court required that for habeas relief to be granted, the error must have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

The plurality decision, adopting the *Kotteakos* standard by a five to four vote, but yielding six separate opinions, four in dissent, is the standard by which this Court is governed. The opinion, and the standard which is adopted, is merely a reflection of the principle that collateral review is different from direct review, *id.* at 633, and that direct review is the principal avenue for challenging a conviction. *Id.* The *Brecht* standard was applied in *Sherman* and is applicable to the case now before the Court.

2. Petitioner did not receive ineffective assistance of counsel.

a. Applicable standard

Probably the only easy aspect of the matter before the Court is articulating the standards upon which claims of ineffective assistance of counsel are to be judged. The standards are established in *Strickland v. Washington*, 466 U.S. 668 (1984), and have been applied on numerous occasions by this Court.

In *Strickland*, the Supreme Court approved as the proper standard for attorney performance that of "reasonably effective assistance". *Id.* at 687. The Court stated:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 686-87.

There are, therefore, two elements of the *Strickland* test, each of which must be met before the conduct of counsel can be found to be constitutionally defective. First, petitioner must show that he received deficient legal representation, measuring the competency of his counsel against what "an objectively reasonable attorney

would have done under the circumstances existing at the time of the representation," *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir. 1996), and petitioner must show actual prejudice, that is, he "must demonstrate that the error worked to his 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.' " *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *Poyner v. Murray*, 964 F.2d 1404, 1425 (4th Cir. 1992)).

In analyzing trial counsel's performance under the "deficiency" prong of *Strickland*, a reviewing court is required to be highly deferential in scrutinizing counsel's tactics. *Bennett v. Angelone*, 92 F.3d 1336, 1349 (4th Cir. 1996) (citing *Strickland*, 466 U.S. at 689). Further, reviewing courts are admonished to "not permit the benefit of hindsight to impact . . . review," *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) (citing *Strickland*, 466 U.S. at 689).

Respondent argues that in reviewing petitioner's ineffective counsel claims "this Court not only is limited to the facts as they were presented to the Virginia Supreme Court, but also is limited to determination of whether the state court reasonably rejected the claim under *Strickland v. Washington*." (Resp. Mem. at 16 (citation omitted).) The Court does not agree.

First, "[w]hether counsel's performance was constitutionally adequate is a mixed question of law and fact . . . ," and on appeal is reviewed *de novo*. *Savino*, 82 F.3d at 598; *Stout v. Netherland*, No. 95-4008, 4007 1996 WL 496601 (4th Cir. September 3, 1996); *see also Ostrander v. Green*, 46 F.3d 347, 354 (4th Cir. 1995); *Poyner*, 964 F.2d at 1416.

Second, this Court is not relegated to the status of a judicial rubber stamp on any issues that may have "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht* at 637; *Kotteakos* at 776. Inadequate representation, when it occurs, frequently has a "substantial and injurious effect."

Before addressing the individual claims of ineffective assistance, it is appropriate to consider, at the threshold, the level of effort extended on petitioner's behalf by trial counsel.

The record reveals that trial counsel filed a total of more than thirty motions on petitioner's behalf, addressing matters of evidence, transcripts, the size of the jury panel, a proposed jury survey, appointment of a mental health expert, discovery, a request for additional attorneys, exculpatory evidence, identification of experts, sentencing, the constitutionality of the death penalty, and other matters relevant to petitioner's case. There were motion hearings on September 25, 1992; November 2, 1992; December 8, 1992; and January 8, 1993.

Counsel was given great latitude by the trial court during *voir dire* and extensively questioned members of the jury, successfully challenging a number of panel members. However, as might be expected, not all of counsel's challenges were upheld. That there were some panel members unacceptable to the defense is neither unusual nor unconstitutional.

Trial counsel were faced with two eye-witness co-defendants, the recovery of the gun used in the killing, and medical evidence that the decedent was shot at point-blank range, all in the guilt phase of the trial.

During the sentencing phase of the trial, counsel were faced with the testimony of a victim shot and wounded only a week before the murder of Kayani, the testimony of a brother who was in prison at the same time as petitioner, evidence of an extensive criminal history for such a young man, and a mother able to provide only minimal assistance.

Trial counsel had terrible facts to work with, an unsophisticated client with a history of escalating propensities for violence, and difficult choices at every turn.

Finally, it should not be forgotten that trial counsel were successful in obtaining a writ of *certiorari* in the United States Supreme Court and preserving a significant issue arising out of the Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994).

It is a given that with the perfect clarity of hindsight, some things might be done in a different manner if counsel were given a second opportunity to try the case. The Court is, however, bound by the record.

b. <u>The issue of "trial strategy" is irrelevant.</u>

As the Fourth Circuit has noted, a lawyer's performance is entitled to a strong presumption of reasonableness. *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989); *Pruett*, 996 F.2d at 1568. *Strickland* advises courts to apply a "heavy measure of deference to counsel's judgments," *Strickland* at 691, a sentiment embraced by the Fourth Circuit in *Satcher* and reflected in a series of earlier opinions from this Court. *See also Stout*, 1996 W.L. 496601 at *7

(counseling that courts "resist [ ] the temptation to second-guess the adequacy of counsel's strategy based solely on the fact that the strategy has resulted in an adverse outcome"); *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) ("We emphasize . . . that neither Bell nor any other aggrieved defendant can manipulate this forum to construe a reasonable but ultimately unsuccessful strategy in his favor. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitely prove ineffective assistance of counsel"); *Bennett*, 92 F.3d at 1349 (finding that rational, if imperfect, trial strategy is not ineffectiveness); *Bunch*, 949 F.2d at 1363 ("When examining ineffective assistance claims, however, we must appreciate the practical limitations and tactical decisions that trial counsel faced.")

1. Trial counsel were not ineffective because they advised petitioner not to testify.

It is difficult to imagine a decision more personal to, and more dependant upon, the relationship between an attorney and his or her client than the decision addressing whether his or her client should testify.

The affidavits in this case make clear that trial counsel were struggling with a difficult factual situation, knowing before trial that the Commonwealth had the benefit of the testimony of two co-defendants and that petitioner had an extraordinarily bad record which could be used against him in the guilt phase. The affidavits also reveal that the decision not to have petitioner testify was made at the last minute but specifically after consultation

between petitioner and lead trial counsel. The decision was collaborative rather than unilateral.

The decision not to have petitioner testify at trial represented an informed change of strategy in the midst of trial. Such a decision is "virtually unchallengeable" on appeal. *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994) (quoting *Strickland*, 466 U.S. at 690). *See also Williams v. Kelly*, 816 F.2d 939, 947 (4th Cir. 1987) (advice to robbery defendant to testify found not to be ineffective assistance); *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) (not ineffective assistance for trial counsel to neither recommend nor attempt to persuade defendant to accept a plea bargain); *Clozza v. Murray*, 913 F.2d 1092, 1100-01 (4th Cir. 1990) (not ineffective assistance of counsel to concede guilt).

2. Trial counsel was not ineffective for failing to confront the prosecution's argument that the gun was fired twice and in an upward position.

This is merely an extension of petitioner's argument that his trial counsel were ineffective for failing to have him testify. As appropriately noted by respondent, petitioner had already entered a plea of guilty to the robbery. Two eye-witnesses had already testified that petitioner had a gun; one of the eye-witnesses heard petitioner threaten the clerk, and the other saw petitioner squat down next to the clerk, place the gun to his head, and shoot him, after which he stood up laughing. Two of petitioner's co-defendants had already testified against him. Petitioner had a prior felony record, which had not

yet been brought out. There were numerous reasons why it might be appropriate for him not to take the witness stand. After consultation with his counsel, petitioner elected not [sic] take the witness stand.

Counsels' advice not to testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance. *Hutchens v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983)

3. Trial counsel did not fail to challenge the testimony of the Commonwealth's medical examiner, Dr. Francis Fields.

This claim has several components. First, habeas counsel object to the fact that Fields was not subjected to any questioning concerning her qualifications; second, the handling of her testimony is attacked on the grounds that she was not "qualified to testify as to projectile direction, trajectory or shooting reconstruction," (Pet. ¶ 165); third, there is an attack on trial counsel because Fields testified without objection from the defense that the bullet was fired in a forward, upward and rightward direction; and finally, trial counsel are criticized for venturing into the subject of powder burns around the wound. (Pet. ¶¶ 165-70.) All of the objections constitute the quintessential type of "Monday morning quarterbacking" which *Strickland* precludes.

Examination of the trial transcript reveals that Fields' testimony was limited to the scope of her professional knowledge, as a medical examiner. The fact that her

qualifications as a medical examiner were stipulated to is "virtually unchallengeable." *Turner; Strickland.*

Fields' testimony was identical to the facts set forth in the autopsy report, a copy of which was furnished to counsel well before trial. Her testimony of the path that the bullet took from the time that it entered the victim's body until the time that it exited the victim's body was based upon her first-hand knowledge, acquired in the course of performing the autopsy on the victim, and was clearly within her area of expertise and range of competence insofar as the opinion reflected in that testimony is concerned.

Fields answered only the questions which were addressed to her. She did not testify about the angle at which the gun was held, only the path the bullet took. Photographic exhibits confirmed her testimony. Any conclusions about petitioner's conduct were left to the jury.

Finally, defense counsel was entitled to explore the subject of powder burns. That the line of questioning was unhelpful does not mean that counsel was constitutionally ineffective.

The claim is without merit.

4. Trial counsel did not fail to adequately cross-examine the "firearms identification" expert.

The gravamen of this complaint is that trial counsel permitted Julian Mason to testify in areas beyond that of "firearms identification," the expertise ascribed to him in the claim. However, the claim misrepresents the record.

Trial counsel filed a motion to compel the state to identify any expert witnesses they intended to call. (Rec. at 0096.) At a hearing on January 8, 1993, the motion was specifically addressed. Trial counsel acknowledged that the medical expert would be Doctor Fields, and the autopsy report was a part of the record to which trial counsel had complete access. The Commonwealth stated "the only other expert, other than the medical examiner, that I am aware of that has done anything in connection with this case would be Julian Mason, the ballistics man from the Division of Forensic Science." (1/8/93 Tr. at 4.) The Commonwealth went on to say that the defense had had the ballistics report since November 28, 1992. The Commonwealth Attorney noted that the bullet which was recovered was so mangled, it could not be used to prove anything. However, he went on to represent to the defense the following:

> [A]nd the only other thing he would say is that this .38 caliber revolver is capable of firing 9 millimeter rounds.
>
> And it would cause the same kind of microscopic markings on the bullets as the bullet he found on the floor. But he can't say it came from that gun.
>
> The only reason he would testify is to testify that 9 millimeters will fire in a .38 caliber revolver.
>
> THE COURT: My question is, Mr. Arrif, does that answer your question?
>
> MR. ARRIF: Yes, it does. We'll withdraw that motion, Judge.

(1/8/93 Tr. at 5.)

The testimony of Mason at trial strictly followed the representations of the attorney for the Commonwealth.

The only testimony which went beyond that described by the Commonwealth during the motion hearing was the testimony of Mason that there was no evidence that the gun would "misfire," nor was there any evidence to suggest that the gun had a "hair trigger." Both of these subjects were properly raised on redirect examination, after the subject of the mechanical condition of the murder weapon was properly raised by trial counsel on cross-examination.

While the defense cross-examination of the expert may reflect the consequences of violating the old legal maxim, "if you don't know the answer, don't ask the question," there is not a single question propounded to the expert, whether on direct or cross, that was reasonably outside of the expected range of testimony of Mason, given his previous identification by the Commonwealth as a "ballistics expert." Further, his ability to identify the operating mechanism of a firearm is totally consistent with his identification as a "firearms identification" expert.

This claim is without merit.

5. Trial counsel were not ineffective for failing to seek outside assistance.

This claim is precisely what Judge Wilkinson referred to when he wrote "[i]t is becoming all too commonplace to charge even diligent counsel in the midst of difficult

circumstances with the adverse outcome in a capital case." *Bunch* at 1363.

The claim is presented through a number of different attacks on the efforts of trial counsel. There is criticism of the fact that trial counsel essentially conceded that petitioner fired the fatal shot; that trial counsel was at fault for failing to acquire a defense expert to testify "that the angle of the bullet was probably in either a downward . . . or sideways position," (Pet. ¶ 188), assuming such proposed testimony would have been permitted; that trial counsel was ineffective for objecting to Exhibit 14, a photograph showing where a bullet was recovered, (Pet. ¶ 190); the failure of counsel to object to the testimony of a police officer who identified the photograph and the bullet, and additionally, identified what was thought to have been a ricochet, (Pet. ¶ 194); and the failure to have a witness testify that certain clicking sounds heard by witnesses as petitioner exited the 7-11 came from the door opener, as opposed to the gun petitioner was holding, (Pet. ¶ 197).

It first need be said that counsel have offered nothing to establish that any of the theories which are discussed in the course of this objection are plausible, let alone capable of being supported by a credible witness. Second, the photograph to which counsel objected showed a bullet in the area of the vicinity where the decedent was shot. The basis for the objection was that the Commonwealth failed to lay a foundation to establish that that was the bullet that had killed the decedent and second, that counsel had not previously been shown the location where the bullet was recovered. Neither of the objections were valid. The police officer who photographed the

crime scene identified a photograph showing the bullet on the floor of the 7-11 and then identified the bullet. The second part of the objection was blunted by trial counsel's acknowledgment that he may have seen the bullet in another picture shown to him by the Commonwealth prior to trial. (1/27/93 Tr. at 66-70, 73.) Finally, the testimony of the police officer that he believed the bullet ricocheted off of the safe was admitted, without objection. Assuming, *arguendo*, that trial counsel should have objected to the testimony, the failure to do so was harmless. It could not possibly have damaged the defense's case, given the unrebutted testimony that petitioner fired the gun while squatting down beside the decedent next to the safe off which the bullet is alleged to have ricocheted. Any error which may have occurred fails to rise to a constitutional level.

Prior to *Strickland*, the Fourth Circuit recognized that the standard for attorney conduct "does not require that representation be flawless, only that all decisions materially affecting defendant's representation be the product of informed judgment, not neglect or ignorance." *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978).

The standard articulated in *Strickland* makes even clearer that the conduct of counsel must result in actual prejudice to a defendant before it rises to a constitutional level.

This claim does not rise to the *Strickland* standard.

c. Trial counsel was not ineffective for failing to object to co-defendant's testimony about his sentence for the murders.

This particular claim is not addressed in any of the affidavits of trial counsel. Thus, habeas counsel are left to speculate, in the form of a claim, about the failure to object.

It is easy to see from the presentation of petitioner's counsel, and the respondent's answer, that reasonable counsel could differ. Petitioner, by counsel, says that the presentation of a co-defendant's life sentence had the affect [sic] of leaving the jury "to impose a harsher sentence on Mr. Ramdass to reflect his comparative culpability rather than because the sentence was appropriate on its own." (Pet. ¶ 202.)

Respondent replies by citing *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979), in which the defense sought to offer in evidence the fact that a co-defendant in a brutal killing had been convicted of capital murder and sentenced to life, but the evidence was excluded on the grounds that it did not constitute mitigation evidence under section 19.2-264.4 of the Virginia Code and that the trial court did not abuse its discretion in refusing it as irrelevant. *Copolla* at 804-05.

Singh participated in the planning and execution of the robbery resulting in Kayani's death. He was as culpable and susceptible to capital punishment as petitioner. It was not ineffective assistance to permit the jury to know that Singh would live. It was appropriate to make the jury aware that a co-defendant, testifying against petitioner, would live on.

It is precisely this kind of claim which gives rise to the admonition that reviewing courts must be "highly deferential" in scrutinizing trial counsel's tactics. *Strickland*, 466 U.S. at 689, applied in *Beavers v. Pruett*, No. 9704, 1997 WL 585739 (4th Cir., September 23, 1997); *Bennett v. Angelone*, 92 F.3d 1336, 1349 (4th Cir. 1996).

d. Miscellaneous claims of ineffectiveness.

1. Trial counsel did not conduct adequate voir dire (Claim 6(a)).

This claim incorporates several allegations, not all of which will be specifically addressed.

Habeas counsel addresses the makeup of the jury (all white), the background of the jury (several had read accounts in the media), and the experience of the jury (some members of the panel had been victims of violent crimes).

Counsel particularly objects to the retention of jurors Powell and Ross, who, in response to very confusing questions, appeared to have difficulty with the concept of considering various mitigating circumstances.

Counsel object to members of the panel who described the crime as "brutal" (Juror Owens, 5/18/93 Tr. at 47), "horrible" (Juror Peoples, 5/18/93 Tr. at 50), a juror who was a friend of a witness in the case, (*id.* at 43), two jurors whose children or in-laws were police officers in Fairfax County, (*id.* at 68-69), several jurors familiar with the crime scene, (*id.* at 45-47), and eight jurors that were victims of crimes, (*id.* at 83-88). Finally, counsel object to the retention on the panel of Juror Amelia

because she indicated she might have "reservations" if petitioner didn't testify. (*Id.* at 90.)

On direct appeal, trial counsel presented three issues: that the trial court erred in refusing to dismiss a juror personally acquainted with one of the witnesses and a second juror who had preconceived notions about the brutality of the crime (Assignment of Error 18), that the trial court erred in refusing to permit inquiry into whether jurors had the belief that petitioner would be executed if the death sentence was imposed (Assignment of Error 19), and that the trial court erred in denying the opportunity to *voir dire* the jury regarding specific mitigation circumstances (Assignment of Error 20). All of these claims were abandoned on appeal and treated by the court as waived. *Ramdass*, 246 Va. at 419. In the state habeas petition, only three claims were raised: trial counsel's failure to move to strike Amelia for cause, the failure of trial counsel to move for individual *voir dire*, and the failure to question the majority of the panel regarding consideration of mitigating factors and sentencing. All of these issues were rejected by the Supreme Court on the merits.

The only issues which survive for consideration are those pertaining to jurors Amelia, Ross, and Powell. The latter two jurors were the last jurors questioned about their willingness to consider mitigating factors.

The parties agreed "to have a panel of twenty-three [jurors] . . . and that we agree that both sides will have five preemptory challenges, which will then leave one juror as an alternate in case there is a need for it." (1/26/93 Tr. at 27.)

Examination of the transcript reveals that the questioning of Ross and Powell occupies twenty pages of record. In the course of the examination, it is clear that the defense counsel asked inarticulate questions on occasion which evoked responses from the witnesses indicating that certain elements of the case could not be considered by them in mitigation, although each of the jurors acknowledged that they could follow the instructions of the court if told to consider certain mitigating factors. At the conclusion of the examination, trial counsel objected to each of the jurors and moved to strike them for cause stating "[y]our honor they have demonstrated that they will not consider specific facts as mitigating factors." (5/18/93 Tr. at 278.) In fact, counsel emphasized that the responses to the questions by the jurors indicated that they could not consider things such as age in mitigation of the sentence, the matter about which counsel was most concerned.

As to Ross and Powell, there is no question that their presence on the jury was challenged, that the challenges were overruled, and that the decision of the trial court was within the sound discretion of the trial court to make. This element of the claim is without merit.

The claim with regard to juror Amelia has even less merit. In the course of general questions posed to the panel, Amelia said she thought she might have reservations if petitioner didn't testify. However, the transcript, thereafter, fails to reveal that Amelia was ever selected as a member of the trial panel.

The transcript for January 26, 1993, reveals that the trial panel consisted of jurors Matthys, Oglesby, Tkach,

Wood, May, Owens, Volpe, McClellan, Padberg, Schuessler, Young, Patterson, McMahon, McDaniel, Peoples, Shavlik, McEntire, Sillex, McNette, Noud, Moreau, Powell, and Ross. Amelia was not a part of the panel. (1/26/93 Tr. at 285-89.)

Powell, Moreau, Peoples, McMann, Patterson, Young, Owens, Wood, Oglesby, and Mathis were struck. Powell was the fifth preemptory strike by the defense. Ross was the alternate and was excused prior to the commencement of deliberations (1/28/93 Tr. at 63.)

Petitioner does not assert claims against any of the remaining members of the jury panel. Since all of the members of the panel to whom petitioner objected were removed from the panel, prior to deliberations, no claim based on a lack of jury impartiality can survive. *Ross v. Oklahoma*, 487 U.S. 81, 85-86 (1987). All of the remaining jurors were constitutionally impaneled, and this claim is without merit.

2. Counsel was not ineffective for conceding the nature of petitioner's background (Claim 6(b)).

This claim hinges upon counsel's statement that "Bobby Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future," made in the defense opening statement during the sentencing phase. (Pet. ¶ 233; 1/29/93 Tr. at 98.)

The next paragraph of the petition effectively acknowledges that the statement was a reflection of trial strategy: "counsel may have hoped in this way to establish credibility for their mitigation theory. . . . " (Pet. ¶ 234.) *Strickland* precludes us from second-guessing.

Further, statements which may appear to concede an element of the prosecution's case, or present a defendant in a bad light, are consistent with trial strategy of seeking to maintain credibility with the jury and do not constitute ineffective assistance of counsel. *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir. 1990); *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995); *Brown v. Dixon*, 891 F.2d 490, 500 n.20 (4th Cir. 1989).

As the court noted in *Bell*, "unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel." *Id.* at 429.

3. Trial counsel were not ineffective in their preparation for the sentencing phase of trial (Claim 6(c)).

Habeas counsel make two arguments, into which they attempt to blend the procedurally defaulted claims concerning Dr. Samenow, the mental health expert appointed by the court.

Because the issue of Dr. Samenow is procedurally defaulted, his assistance, or lack thereof, will not be further addressed.

Counsel claim that the jury was denied mental health information prepared in the course of prior evaluations as reflected in petitioner's juvenile files and that the

evaluations would provide strong mitigating evidence. (Pet. ¶ 239.) The petition states that the defense attempted to present the information through the hearsay testimony of a probation officer, which was objected to by the prosecution and barred by the court. *Id.* That is not a correct statement.

The prosecution objected to certain testimony offered by the defense through Jennifer Joffe, a probation and parole officer for the Commonwealth of Virginia who had conducted a presence investigation on petitioner four years earlier. (1/29/93 Tr. at 115.) Joffe was asked about petitioner's mother, and more particularly about Mrs. Ramdass's physical health history. The Commonwealth objected. After some discussion, and a determination that Mrs. Ramdass would testify, the Commonwealth's objection was sustained. (*Id.* at 120-21.) However, Joffe was permitted to testify, and did testify about petitioner's counseling. The record reveals that she testified petitioner was in counseling and psychotherapy from August through September, 1986, and October through November, 1986, and for a short time when he was on parole, and that therapy was terminated "because he saw no reason to be in therapy. Another time, it was terminated because he was recommitted to the state department of correct[io]ns." (1/29/93 Tr. at 123.) The real problem for petitioner came on cross-examination when the witness was asked whether the reports indicated that petitioner was psychotic or suffering from severe mental problems. The answer to each question was no. (1/29/93 Tr. at 126-27.)

Habeas counsel also argue that the mitigation phase was constitutionally handicapped by the nonappearance

of a guidance counselor. Apparently, trial counsel thought that the witness had been recognized, but she had not. Upon discovering that fact, trial counsel notified the court, and the record contains a proffer of her expected testimony:

> Your Honor, Ms. Mayo, her full name is June Mayo, is a seventh grade teacher at the Carl Sandberg Middle School in Alexandria, Virginia. She was Bobby's seventh grade teacher. She's one of the few people that Bobby would actually talk to.
>
> He would tell her about his life and such. She told me he did fairly well in her classes, not anywhere else and that she liked him and that she was aware that he did have problems elsewhere in school and with his family.
>
> That's pretty much it.

(1/29/93 Tr. at 242.)

That proffer was permitted to go to the jury without objection by the Commonwealth. Thus, the essence of the testimony that Mayo would have offered was not lost to petitioner but made known to the jury in the form of a proffer.

Finally, in addition to Joffe, trial counsel called to the witness stand the petitioner, his brother, and his mother. As a prelude to his mitigation case, trial counsel made an extensive opening statement and informed the jury of the myriad problems experienced by petitioner, describing his family as "unbelievably dysfunctional" and referring to petitioner as one of "Fagan's children from Dicken's [sic] London." (1/29/93 Tr. at 91) He described petitioner's lack of school experience; his experimentation

with PCP, cocaine, marijuana, and alcohol; his prior incarcerations for serious offenses; his pending charges in other jurisdictions; his minimal contact with his father; his residence in a storage shed of a condominium for a while; his abject poverty; his lack of any serious parenting; and his total absence of any employment history.

Reasonable attorneys might have argued about how to present this background, but it is unlikely that there was much additional material which could have been offered in mitigation given the facts which the jury heard in the guilt phase and the criminal history which the jury heard in the sentencing phase. The decisions made by his counsel in presenting the sentencing portion of his case reflect the kind of judgment which must be made in the context of the entire case. There is no evidence to suggest any additional witnesses, assuming they could be found, would have produced a different result, nor is there even an inference to be drawn that petitioner suffered actual prejudice. Counsel's performance was not constitutionally defective. *Beavers v. Pruett*, 1997 WL 585739 *4 (4th Cir. September 23, 1997); *Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996).

Finally, it is clear that in his entire juvenile and short adult history, there is not a scintilla of evidence to suggest that petitioner suffered from any mental disease or defect which would render him unaccountable for his behavior.

All of the admonitions emanating from *Strickland* apply with particular force to this claim. It is without merit.

3. Petitioner was not entitled to a medical doctor and an investigator (Claim 7).

On December 4, 1992, trial counsel filed three motions: (1) a motion for the appointment of additional counsel; (2) a motion for an expert investigator; and (3) a motion for a physical examination ("to include eye tests, hearing tests, and a . . . physical examination to determine . . . whether or not the defendant suffers from diabetes, arterioscleroses, or other physical disability.")

None of the motions was accompanied by a memorandum in support thereof nor did any of the motions articulate specific facts which would justify the granting of the motions.

On December 8, 1992, the matters came on for hearing before the court. In addressing the motion for a complete physical examination, counsel, after first noting his objection that he was unable to proceed *ex parte*, explained that he wanted a complete physical because his client "does have sight and hearing defects, and I have information that leads me to believe that he may suffer from some type of reflexive disorder." (12/8/92 Tr. at 5.)

The Commonwealth pointed out that petitioner had probably had numerous physicals and that there may have been medical records in the institutions which the defense could examine. (*Id.* at 6.) The court, in response, noted the lack of information that had been furnished to the court to justify such an examination and denied the motion. (*Id.* at 6-7.) At this point, counsel for petitioner asserted his theory that petitioner fired the gun as a reflexive action, after hearing the first shot fired by Wilson. Trial counsel went on to state "I also believe that

Mr. Ramdass is suffering from what is called muscle-boundness, that a twist of the body can require a reflexive action in the hand." (*Id.* at 8.) The court asked counsel, "[d]o you have any medical evidence to support your belief," to which counsel replied "[a]t this time I do not, your Honor, because I have not been given any physical records." (*Id.* at 8.) The motion was denied. (*Id.* at 9.)

The court then went on to address the request for an expert investigator. Trial counsel acknowledged that he had no absolute right to his request, but relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985) (finding entitlement to assistance of mental health expert when sanity is significant trial factor or issue of future dangerousness is used by prosecution) and *Ross v. Moffitt*, 417 U.S. 600 (1974) (petitioner entitled to the assistance of counsel to pursue appeal as a matter of right). (5/18/93 Tr. at 14-15.)

In response, counsel for the Commonwealth opposed the appointment, citing in support of his opposition *Gray v. Commonwealth*, 356 S.E.2d 157, 166 (Va. 1987); *Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1985); *Stockton v. Commonwealth*, 314 S.E.2d 371 (Va. 1984); *Quintana v. Commonwealth*, 295 S.E.2d 643 (Va. 1982); and *Yeatts v. Commonwealth*, 410 S.E.2d 254, 258 (Va. 1991), all cases in which the appointment of an investigator was denied. (5/18/93 Tr. at 19-20). The court denied petitioner's motion for the appointment of an expert investigator but specifically granted the motion to appoint additional counsel to assist in the defense of the matter. (*Id.* at 22.)

The claim in its entirety is without merit.

Taking the matters in reverse order, while the request for an expert investigator, unsupported by all but the most perfunctory of reasons, was denied, the defense team was given additional relief, at public expense, in the form of an attorney. If the purpose of the investigator was to gather documents, interview witnesses, and help prepare the case, both in response to the charge and in mitigation, the appointment of a third attorney in the case goes a long way toward satisfying the minimally articulated need for an expert investigator.

Further, denial of a private investigator has been upheld when a defendant requesting such assistance "has offered nothing more than a bare assertion that private assistance would have been beneficial to him, which does not state a violation of due process." *Gray v. Thompson*, 58 F.3d 59, 77 (4th Cir. 1995) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985)).

The request for a physical examination was, likewise, correctly refused. Petitioner relies almost exclusively on *Ake v. Oklahoma*, 470 U.S. 68 (1985), which stands for the proposition that when an indigent defendant credibly raises the issue of his sanity at the time of the commission of the offenses with which he is charged, he must be accorded the opportunity to pursue that defense by the appointment, at state expense, of a mental health expert who can provide the requisite assistance. While *Ake* is couched in language addressing an insanity defense, the principle that it articulates – that when a defendant raises a genuine need for expert assistance in order to be able to defend himself against criminal charges, assistance is mandated – is a constitutionally sound principle, premised on demonstrated need. It does not constitute a license for a "fishing expedition," and defense counsel is

not entitled to medically troll, in hope of snagging a medical excuse.

In *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), the Fourth Circuit granted the habeas petition of a defendant who sought the assistance of a forensic pathologist in a murder case based upon the defendant's contention that the death of the decedent, which occurred eight months after he was shot, was not proximately caused by the defendant. In order to establish his claim, it was essential that he have expert assistance, but his indigency precluded him from acquiring such expertise. Judge Butzner stated:

> Because a substantial question requiring expert testimony arose over the *cause* of Maybank's death and because Williams' defense *could not be fully developed without professional assistance that would have been available to a person who could afford his own defense*, Williams has satisfied the dual test prescribed . . . to establish that he was denied equal protection of the law. Further, the trial judge's refusal to provide an expert deprived Williams of the effective assistance of counsel and due process of law in violation of the sixth and fourteenth amendments.

Id. at 1027 (citations omitted) (emphasis added).

That case further stands for the proposition that the determination of an indigent defendant's need for expert assistance is committed to the sound discretion of the trial judge. *Id.* at 1026. *See also United States v. Borne*, No. 90-5522, 1991 WL 209832 (4th Cir., October 21, 1991); *United States v. Briley*, No. 86-5619, 1987 WL 37034 (4th Cir., April 7, 1987).

The matter was discussed in *Terry v. Rees*, 985 F.2d 283 (6th Cir. 1993), in which a defendant sought a pathologist to independently determine the cause of death. The court concluded that the defendant received a fundamentally fair trial. *Id.* at 284. However, in the course of the opinion they discussed the *Williams* case, concluding "[w]e find *Williams* persuasive and endorse its procedure for resolving this issue in this Circuit." *Id.* at 285.

Williams remains good law in the Fourth Circuit.

Following *Ake*, the Supreme Court addressed the issue of appointment of counsel on appeal and concluded that the due process clause of the Fourteenth Amendment does not require a state to provide respondent with counsel in a discretionary appeal to the state supreme court. The court noted:

> An indigent defendant seeking review in the Supreme Court of North Carolina is . . . somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. . . . And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Ross v. Moffitt, 417 U.S. 600, 616 (1974).

Finally, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), an incidental issue raised by petitioner's challenge to his conviction for murder pursuant to the Mississippi capital punishment statute was the trial court's refusal to appoint various experts and investigators to assist him, specifically a criminal investigator, a fingerprint expert, and a ballistics expert. The Supreme Court, in a footnote, stated:

> The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than 'the general statement that the requested expert "would be of great necessarius witness." ' 443 So.2d 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. . . . We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.

Caldwell, 472 U.S. at 323, n1.

4. Petitioner was not unreasonably denied the opportunity to proceed in camera in pursuit of his experts (Claim 8).

Petitioner, by counsel, asserts a constitutionally mandated entitlement to *ex parte* hearings on his request for the appointment of experts, in this particular case, a medical doctor and an investigator.

Petitioner cites no cases which establish the constitutional entitlement he seeks to impose.

Virginia law has been consistently applied. The Virginia Supreme Court, in deciding this case, relied upon its previous ruling in *O'Dell v. Commonwealth*, 364 S.E.2d 49 (Va. 1988), and applied the ruling in *Ramdass*, 437 S.E.2d at 569, and later in *Weeks v. Commonwealth*, 460 S.E.2d 379 (Va. 1994).

Further, a decision establishing such a constitutional right and applying it to petitioner's case would constitute the establishment of a new rule, since the constitutional protection petitioner seeks was not in place at the time petitioner was tried. Habeas relief is appropriate only if a state court considering the claim would have felt compelled by existing precedent to apply the rule sought. *Saffle v. Parks*, 494 U.S. 484, 488 (1990), applied in *Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996). Further, in order for a new rule to be applied retroactively, the rule must fall within one or two exceptions provided in *Teague v. Lane*, 489 U.S. 288 (1989): First, a new rule may be applied retroactively if the rule "places a class of private conduct beyond the power of the State to proscribe." *Saffle* at 494 (citing *Teague*, at 311.) That is not the case before the Court.

Second, a new rule may be applied "for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Parks v. Saffle* at 495 (citing *Teague* at 311.) *See Gray*, 116 S.Ct. at 2084-85.

If entitlement to an *ex parte* hearing on a request for expert assistance for an indigent defendant is constitutionally mandated, and it constitutes a "watershed rule of criminal procedure," such a declaration will have to be made by the Court of Appeals or the Supreme Court. The claim is without merit.

5. Petitioner was not unconstitutionally denied exculpatory material by the prosecution (Claim 9).

This claim has two components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made by petitioner's co-defendants and other prospective witnesses, to the police, including inculpatory and inconsistent statements made by co-defendants.

There is no general constitutional right to discovery in a criminal case in Virginia. *Lowe v. Commonwealth*, 239 S.E.2d 112 (Va. 1977). *Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991); *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993). Rule 3A:11, Rules of the Supreme Court of Virginia addresses and provides for limited discovery in criminal cases, setting forth a specific category of materials to which a defendant is entitled. Beyond the entitlement created by the rules, a defendant has no rights.

Examination of the record in this case, including the motions filed by petitioner and the transcripts of the motion hearings prior to trial, reveal that extensive discovery was furnished to petitioner and that the Commonwealth was scrupulous in according to petitioner access

to all matters bearing directly on his guilt or innocence prior to trial. This Court has no question that the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) were appropriately honored.

Addressing the specific matters before the Court, petitioner concedes that he was not entitled to the results of the polygraph examinations of the co-defendants. (Reply Pet. at 83.) First, such material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (1986). Second, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the *Brady* rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1 (1995).

Petitioner's remaining claims are likewise without merit. First, all of petitioner's co-defendants in the offenses for which he was tried, and in offenses occurring in other jurisdictions, were known to or available to counsel for the defense, and the witnesses could have been called on petitioner's behalf, had counsel so desired. Second, in order for a *Brady* violation to occur, the material sought must be "material." Evidence is "material" under *Brady* "only where there exists a 'reasonable probability' " that had the evidence been disclosed the result at trial would have been different. *Wood* at 5. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Further, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990).

Counsel has not asserted either that material was withheld from them that they had no other means of obtaining or that material was withheld from them that would undermine the confidence in the outcome of this trial.

There is no evidence in the record that a *Brady* violation occurred. At least one victim and two co-defendants testified against petitioner; his identity as the person who committed the robbery, held the gun, and shot Kayani was established beyond a reasonable doubt. Assuming, *arguendo*, that the purported *Brady* material sought, not counting the polygraph material, was exculpatory in nature, petitioner has made no "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Finally, the trial court did not commit error by refusing to examine the prosecution's file *in camera* to determine the presence of exculpatory material. In addressing the issue, the Virginia Supreme Court said

> In order to establish that the Commonwealth has violated a defendant's *Brady* rights, the record must indicate that the undisclosed evidence was in fact exculpatory and material either to guilt or to punishment. . . . Nothing in this record indicates either that the Commonwealth's Attorney has withheld exculpatory information or that the answers given by Ramdass's accomplices in their polygraph tests would be favorable to him and material to his guilt or punishment.

Ramdass, 437 S.E.2d at 570.

In *Rowe v. Grizzard*, 591 F. Supp. 389 (E.D. Va. 1984), defense counsel asked for co-defendants' and witness's statements "which contradicted others' statements and/or were internally inconsistent." *Id.* at 398: The court refused, noting the prosecution's burden to comply with *Brady*. The district court affirmed, noting "[a]bsent a more specific request than was made, the trial court is not required to make an *in camera* inspection of the prosecution's entire file." *Id.*

6. Petitioner's claim that the statutory review of his death penalty is insufficient is both procedurally barred and unsupported by the record (Claim 13).

Respondent argues that this claim is procedurally barred under *Slayton*, and the Court agrees.

Petitioner argues that the proportionality review required by section 17-110.1(C)(2) of the Virginia Code is insufficient for a variety of reasons, the most significant of which addresses the alleged insufficiency of the comparisons made by the Supreme Court in assessing whether the penalty imposed upon petitioner is consistent with cases bearing similar facts. There is very little legal authority cited for the position taken by petitioner,

and much of the argument is unsupported. However, in addition to attacking the character of the review conducted by the Supreme Court, petitioner also asserts,

> The state court had a duty under Virginia Code section 17-110.1(C) to scrutinize the entire trial record for the influence of passion, prejudice, or any other arbitrary factor, in addition to allegations of prejudice raised by counsel. In spite of this mandate, the state court ignored ample evidence of passion, prejudice, and arbitrariness in the verdict. Despite the numerous examples of passion, prejudice, and arbitrariness noted throughout this petition, all of which is incorporated herein by reference, the Virginia Supreme Court failed to perform any meaningful review of the record for such conduct.

(Pet. ¶ 349.)

Section 17-110.1(c)(2) mandates that the Supreme Court consider and determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code Ann. ¶ 17-110.1(c)(2) (Michie 1996).

There are, however, no examples of "passion, prejudice, and arbitrariness" cited in support of the argument nor any suggestion of excessiveness when compared to their cases.

On January 30, 1993, following receipt of the verdict, trial counsel made no motion to set aside the verdict as a product of passion, prejudice, or arbitrariness.

On March 2, 1993, when trial counsel appeared and moved for a continuance of the hearing procedure because petitioner had not yet received all of the records to which he was entitled from the state institutions, no such motion was made.

On April 2, 1993, when petitioner and his trial counsel appeared for sentencing, trial counsel devoted much of the hearing to the constitutionality of electrocution, and more specifically, the means by which electrocution in Virginia is carried out, arguing that both the act, and the means implemented in Virginia, were unconstitutional in violation of the Eighth and Fourteenth Amendments. However, there was no mention of counsel's concern that the verdict was a reflection of passion, prejudice, or arbitrariness.

In the errors assigned on direct appeal, the matter was never raised, a fact noted by the Supreme Court. *Ramdass*, 437 S.E.2d at 573.

In the state habeas corpus petition, as in this federal habeas petition, the issue of the sufficiency of the proportionality review was raised only in the context of the nature of the comparisons engaged in by the Virginia Supreme Court and not in the context of a verdict which was the product of passion, prejudice, or arbitrariness at any time during the trial.

Finally, this Court has read all of the trial transcripts and all of the court documents that were filed by trial counsel, reviewed all of the exhibits admitted into evidence, and read all of the reports filed by experts and relied upon in the course of trial.

If ever a capital murder case was conducted by a judge sensitive to the emotional nature of such a proceeding, this is the trial. The proceeding was clean, to the point of being almost antiseptic. Arguments by the prosecution and the defense were devoid of the kind of emotional appeals that are frequently presented in conscious efforts to inflame a jury's passions to return a particular verdict.

Instead, the proceeding was objective. The Supreme Court of Virginia addressed the nature of the review it conducted, reciting petitioner's criminal history. It stated, "we have examined the records in all capital murder cases accumulated by this Court . . . paying particular attention to those cases in which the underlying felony was robbery and the death penalty was based solely on 'future dangerousness.' *Ramdass*, 437 S.E.2d at 573. Their conclusion, following a detailed review of petitioner's criminal history, was that the sentence was neither excessive nor disproportionate. *See Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990).

Although the Virginia capital sentencing statute requires a proportionality review, the federal constitution does not. *Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996), citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984).

In *Buchanan*, the court went on to say "[t]he Virginia Supreme Court conducted the mandatory statutory review in this case. . . . On collateral review, federal courts are not required to re-examine a state court's good faith findings." *Id.*

When considered in the context of *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996), a capital murder

case marked by the highly inflammatory argument of the prosecuting attorney, relying upon biblical references to behavior and alluding to unrelated grisly murders, the case before the Court is exceedingly clean and supports the finding of the Virginia Supreme Court that the "record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor." *Ramdass*, 437 S.E.2d at 427.

7. The Virginia death penalty statutes, neither on their face nor as applied, violate the Sixth, Eighth, and Fourteenth Amendments, and the Virginia capital murder sentencing statute is constitutional (Claims 10, 14).

Both of these claims focus on the same issue and are addressed jointly herein.

The claims fall generally into broad categories.

Petitioner alleges:

a. A jury is given little guidance and not told what they must find nor are they given any instruction on how to consider the mitigating evidence. (¶¶ 303, 304, 305; see also ¶¶ 351, 352, 353, 356-58, 360-62, 364.)

b. The aggravating factor of "future dangerousness" is unconstitutionally vague, and the penalty is imposed in an unconstitutional manner. (¶¶ 306, 308, 353, 354, 356-358.)

c. Imposition of the death penalty is unconstitutional "because it allows but does not

require that the sentencing court set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in the post-sentence report." (¶¶ 309 and 355 essentially sets forth the same claim.)

d. The sentencing jury is permitted to consider petitioner's unadjudicated criminal behavior. (This ground is discussed separately hereinafter.)

e. The jury was improperly instructed by the court, at one stage, when the trial judge advised them that they must find beyond a reasonable doubt the "possibility" that petitioner would pose a danger to the public, as opposed to the "probability." (¶¶ 366-69.)

We begin with the proposition that "the punishment of death does not invariably violate the Constitution." *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). In that case, Justice Stewart said "[f]or nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*." *Id.* at 177-78. He went on to note that retribution and the possibility of deterrence are not impermissible considerations for a legislature, *id.* at 183, 185, and then addressed the real concern reflected in the decision of *Furman v. Georgia*, 408 U.S. 238 (1972), holding the then-existing Georgia death penalty statute unconstitutional:

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and

> guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg at 195.

The Court went on to approve a Georgia capital sentencing procedure which included, among other things, a narrowing of the class of murderers subject to capital punishment; specification of certain aggravating circumstances, at least one of which must be found by the jury to exist before a death sentence can be imposed; authorization for a jury to consider any other "appropriate aggravating or mitigating circumstances," *id.* at 197; a statutory provision that the jury "is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court," *id.*; an automatic appeal of a death sentence, *id.* at 198; and mandatory proportional review, *id.* In short, the Supreme Court approved in *Gregg* the kind of proceeding reflected in the Virginia statute.

On the same day *Gregg* was announced, the Court handed down its decision in *Jurek v. Texas*, 428 U.S. 262 (1976), a Texas death penalty case in which the Texas statute required that a jury find either that the conduct of the defendant causing the death was committed deliberately and with reasonable expectation that the death would result; or that it was probable that the defendant would commit criminal acts of violence constituting a continuing threat to society; or, if raised by the evidence, that defendant's conduct was an unreasonable response

to the provocation, if any, by the deceased, as a condition for imposing the death penalty.

Of particular interest, in the context of this case, is the second aggravating factor: whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Jurek* at 269.

The Virginia statute essentially parallels the Texas statute:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offenses of which he is accused *that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . .*

Va. Code Ann. § 19.2-264.4(C) (Michie 1995) (emphasis added).

In addressing the attacks on that aggravating element, the Supreme Court discussed the issue of "vagueness":

> Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does

> not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Id. at 274-76.

The concern that a lay jury might not understand the term "future dangerousness" was addressed in a concurring opinion by Justice Blackman who said "I agree with Justices Stewart, Powell, and Stevens that the issues posed in the sentencing proceeding have a common-sense core meaning and that criminal juries should be capable of understanding them." *Id.* at 279.

Jurek was applied to the Virginia statute in *Peterson v. Murray*, 904 F.2d 882, 885 (4th Cir. 1990), and the statute was found to pass constitutional muster. *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984).

Since *Peterson* and *Jurek*, the Supreme Court has handed down the decision in *Tuilaepa v. California*, 512 U.S. 967 (1994), and cautioned reviewing courts that

> Because "the proper degree of definition" of eligibility and selection factors often "is not susceptible of mathematical precision," our vagueness review is quite deferential. . . . Relying on the basic principle that a factor is not unconstitutional if it has some "common-sense core of meaning . . . that criminal juries should be capable of understanding," . . . we have found only a few factors vague. . . .

Id. at 973-74 (citations omitted).

One of them is not "future dangerousness" as applied in Virginia.

An essential element in the issue of future dangerousness is the ability of the jury to consider not only aggravating, but mitigating factors. In section 19.2-264.4(B) of the Virginia Code, the Virginia statute specifically permits the jury to consider everything that might be a factor in mitigation, and the specific instruction given to the jury in this case told the jury that mitigating evidence was "evidence which may serve for a sentence less than death," and "may include . . . *any* facts relating to the Defendant's age, character, education, environment, mental condition, life and background, or any aspect of the crime itself, which might be considered extenuating or tend to reduce his moral culpability, or make him less deserving of the extreme punishment of death." (1/29/93 Tr. at 254.) The jury was then told, "[y]ou are permitted to fix the punishment of the Defendant at life . . . even if you find unanimously and beyond

a reasonable doubt . . . a probability that the Defendant would commit criminal acts of violence. . . . " *Id.*

Since *Jurek* and *Peterson*, the Virginia statute has been upheld in *Beaver v. Thompson*, 93 F.3d 1186, 1191 (4th Cir. 1996); *Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir. 1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362-63 (4th Cir. 1995); and *Spencer v. Murray*, 5 F.3d 758, 764 (4th Cir. 1993).

The standard was correctly explained, is not vague, and is susceptible of a "common sense" interpretation.

So long as the jury is permitted to consider any mitigating evidence, the instructions to the jury, and the resulting verdict, pass constitutional muster. *Buchanan v. Angelone*, No. 96-8400 (U.S. January 21, 1998).

Petitioner also claims that the statute is unconstitutional because it permits a sentencing court to set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in the post-sentence report. Apparently, the complaint is that at some point in time, and on a basis for which there is no articulated standard, petitioner may receive the benefit of mercy.

A similar claim was addressed in *Gregg* where the Court noted

> [T]he petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him

> guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the state and the Georgia Board of Pardons and Paroles.

Gregg at 199.

All of those conditions, and more, apply to petitioner. The Commonwealth did not have to prosecute this case as a capital case; the prosecutor could have offered petitioner a plea bargain, giving up his right to pursue a capital punishment in return for a plea of guilty; the jury could have imposed a life sentence, as opposed to the death penalty, without ever articulating its reasons; the trial judge, upon receipt of the presentence report, and for "good cause" could have set aside the sentence of death and imposed a sentence of imprisonment for life (section 19.2-264.5 of the Virginia Code); and petitioner may at an unforeseen time in the future, receive clemency in the form of a commuted sentence. However, as the Court went on to note, "[n]othing in any of our cases suggest that the decision to afford an individual defendant mercy violates the Constitution." *Id.* at 199.

The claim regarding consideration of hearsay, as it may be incorporated in a presentence report, borders on the frivolous.

First, there is no constitutional entitlement to a trial free from hearsay evidence. There are specific exceptions recognized in the rules of evidence and certain circumstances where hearsay is deemed appropriate (e.g. section

19.2-299(c) of the Virginia Code). It is mandated by section 19.2-264.5 of the Virginia Code and "shall . . . contain a Victim Impact statement."

Second, by law, the defendant must be informed of all facts and information contained in the report by being furnished a copy thereof. Thus, the defendant is afforded the opportunity to correct and/or rebut erroneous information.

Petitioner is not entitled to relief for this claim which arises out of the Virginia sentencing procedure.

Finally, there is one extraordinarily peculiar claim set forth by petitioner in the course of attacking the Virginia capital murder statute. Paragraph 365 of the petition states, "[a]lthough the Virginia capital sentencing statute contemplates consideration of mitigating circumstances, the emphasis on speculation as to the future dangerousness of the defendant inhibits rational and deliberate consideration of evidence in mitigation and does not adequately allow the jury to dispense mercy."

It is difficult to fathom the basis of the argument in the face of the trial court's instruction to the jury in clear, nontechnical language that even if they unanimously found petitioner to be a future danger that they may impose a life sentence as opposed to the death penalty. (Rec. at 161, Instr. A(S).) The Court can only conclude that the assertion is the result of the emotion engendered in these cases and not the product of a bona fide concern that a Virginia jury is not free to vote for life as opposed to death.

8. Petitioner was not denied the right of confrontation (Claim 11).

Petitioner claims that he was denied the right of confrontation in the course of cross-examination of Ramirez and Singh, each of whom was a co-defendant and participant in the event which is the subject of this petition because the trial court sustained prosecution objections to certain defense questions.

First, the fact that the co-defendants testified and that petitioner had the opportunity to hear their testimony on direct examination, and to cross-examine the witnesses following their direct testimony, absolutely rebuts his claim that he was not entitled to confront his accusers.

Second, any decisions which were made with regard to the scope of permitted cross-examination constitute evidential rulings, not constitutional rulings arising under the Sixth Amendment to the United States Constitution. No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. Rules of evidence govern all of the participants in a trial and apply with equal vigor in criminal cases.

The judgment of the trial court in denying certain questions was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. Under the doctrine in *Sumner v. Mata*, 455 U.S. 591 (1982), this Court is bound to give weight and credence to the decision of the state courts applying Virginia substantive law to the presentation of evidence in the course of a trial.

As the court noted in *Estelle v. McGuire*, 502 U.S. 62 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Quoting *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967), the court in *Estelle* said "it has never been thought that such cases establish this court as a rulingmaking organ for the promulgation of state rules of criminal procedure." *Id.* at 70. *See also Spencer v. Murray*, 5 F.2d 758, 762 (4th Cir. 1993) applying *Estelle*.

9. The use of unadjudicated criminal misconduct in the sentencing phase is constitutionally permitted (Claim 12).

Petitioner complains about the admission of unadjudicated criminal conduct in the penalty phase of the trial. Specifically, petitioner was confronted with testimony in the sentencing phase of two victims of robberies that had not yet been tried. Christopher Cissel, a clerk at Bragg Towers, an apartment hotel, described petitioner robbing him at gunpoint, striking him with a fist, and knocking him to the floor with the butt of the pistol. (1/29/93 Tr. at 37, 39-40.) Emmanuel Selassie, a cab driver, described being robbed and shot at point blank range. (1/29/93 Tr. at 70-76.) Singh identified petitioner as the assailant. (1/29/93 Tr. at 62.)

Such evidence is expressly permitted under the sentencing statute. Va. Code Ann. § 19.2-264.3:2. The statute requires that a defendant be given notice, in writing, of the conduct upon which the Commonwealth intends to rely. Such notice was given in this case in letter form to trial counsel on January 26, 1993. There were no events of

which trial counsel was notified that were new or surprising to trial counsel, consisting, instead, of all of the previous conduct in which petitioner had engaged and about which counsel was thoroughly informed. There was, therefore, no element of surprise.

The procedure has been specifically approved in Virginia. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995), the Fourth Circuit said:

> We next turn to the question of future dangerousness. Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." . . . In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. . . . This rule of latitude – which also allows the defendant to present a wide range of mitigating evidence – was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (Quoting from *Gregg v. Georgia*, 428 U.S. at 204).

Gray at 63 (citations omitted). *See also Peterson v. Murray*, 904 F.2d 882 (4th Cir. 1990) (Virginia's statutory scheme designed to strictly limit access to juvenile records did not prohibit use of defendant's juvenile record in capital sentencing.)

There is no merit to this claim.

10. <u>Petitioner's Simmons Claim has Merit (Claim 1)</u>.

In January, 1993, applicable Virginia law precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. In *Mueller v. Commonwealth*, 422 S.E.2d 380 (Va. 1992), decided only four months before petitioner's trial, the Supreme Court of Virginia said:

> Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to code section 53.1-151(B1), he would not be eligible for parole if convicted of the rape of Charity Powers, since this would be his third rape conviction. He also asserts that he should have been allowed the opportunity to introduce evidence regarding parole ineligibility in mitigation of punishment at the penalty phase of the trial.
>
> We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration.
>
> Further, the United States Supreme Court has expressly left the determination of this question to the individual states, as a matter of state law. *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 3459-60, 77 L.Ed.2 1171 (1983). We perceive no reason in the case before us to depart from our prior rulings on this subject.

Mueller, 422 S.E.2d at 394 (citations omitted).

The court went on to note "[t]hus, this court has drawn a clear distinction between the admissibility of a defendant's parole history and evidence of his future parole eligibility." *Id.* at 394-95.

During the course of trial, the Commonwealth introduced direct evidence that petitioner was on parole in September, 1992, when the predicate crimes were committed (1/29/93 Tr. at 85-86); obtained an admission, during cross-examination, that petitioner was paroled in May and acquired a gun as early as July, 1992; and questioned petitioner about parole violations in 1986, petitioner's absconding from parole, and a subsequent robbery, while a fugitive, (1/29/93 Tr. at 201-02). Thus, petitioner's performance, as a parolee, was before the jury.

At the time of trial, in January, 1993, petitioner had been tried and convicted of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut, sentenced by a jury to a term of seventy-six years imprisonment, and the court had imposed the sentence. (1/29/93 Tr. at 133.) He had also been tried and convicted of two counts of robbery and one count of the use of a firearm at a Dominos Pizza, and was sentenced by the jury to a term of eighteen years, but the sentence had not yet been imposed. (1/29/93 Tr. at 134.) The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court.

On January 29, 1992, there were two statutes on the books which addressed parole eligibility and length of incarceration in cases involving serious criminal offenses.

First, section 53.1-151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The second statutory provision, section 53.1-151(C) of the Virginia Code reads, in part,

> Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class I felony violation . . . he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to Subsection (B1) . . .

A Class I felony is any felony carrying a penalty of death or imprisonment for life.

Because Virginia law prohibited disclosure to the jury of information regarding petitioner's parole eligibility, no instruction to that effect was sought. However, in the course of deliberating on petitioner's punishment, the jury sent a question to the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.)

The immediate response of the Commonwealth was to advise the court of the language of the model jury instructions "that you are to decide what a just punishment is and not to concern yourself with what happens thereafter," based upon Virginia Model Jury Instruction 2.7000. (1/29/93 Tr. at 278.) In response thereto, petitioner's counsel made the following statement:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court (sic) should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is – I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your sentence will be the legal sentence imposed in the case."
>
> I'm open to any other suggestions.

(1/29/93 Tr. at 278-79.)

It is apparent that trial counsel was familiar with prevailing Virginia law but appropriately concerned

about the jury's "perception" that petitioner would be out in a short period of time.

The court responded by quoting the Virginia Model Jury Instruction and stating to counsel "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that that instruction had been given in the past but further responded stating, "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/98 Tr. at 280.)

The court sustained the Commonwealth's objection, informed the jury, pursuant to the Virginia Model Jury Instruction, that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences, and the jury responded by sentencing petitioner to death. (*Id.* at 281.)

It is important to note at this point that trial counsel was not obligated to offer or argue for a specific instruction, contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir. 1996).

Thereafter, the issue was preserved at every stage of the appellate process.

On direct appeal, petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of

capital murder in derogation of the Eighth and Fourteenth Amendments to the United States Constitution. The assignment was rejected on direct appeal. *Ramdass*, 437 S.E.2d at 425-26.

In a petition seeking a writ of *certiorari* from the United States Supreme Court, the issue was raised in the context of the court's refusal to respond informatively to the jury inquiry regarding petitioner's parole status.

That petition for *certiorari* was granted, and on remand, the sole issue addressed by petitioner was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that *Simmons* was not an issue on the basis that petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (1994). About this, more will be said later.

Thereafter, a second petition for writ of *certiorari* was taken to the Supreme Court of the United States incorporating the same issue. The petition was denied. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

Next, in a state habeas petition, the issue was addressed as an assignment of trial court error in the specific *Simmons* context. The claim was rejected on the basis of *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970), the issue

having previously been decided by the Virginia Supreme Court.

Thus, the issue has been preserved at every stage and is before the Court for consideration.

Further, since the writ of *certiorari* was pending in the United States Supreme Court at the time *Simmons* was decided, and the petition for *certiorari* was granted post-*Simmons*, there is no retroactive application required, and as to petitioner, the *Simmons* holding does not constitute a new rule. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *See also O'Dell v. Netherland*, 95 F.3d 1214, 1221 (4th Cir. 1996).

Further, under the doctrine in *Teague v. Lane*, 489 U.S. 288, 301 (1989), a new rule is created if the result was not dictated by precedent existing at the time petitioner's conviction became final. This Court finds that the rule articulated in *Simmons*, "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible," compelled a finding by the Virginia Supreme Court, on remand, that petitioner was entitled to inform the jury, prior to sentencing, of his parole status. *Simmons*, 512 U.S. at 156.

On remand, Justice Whiting, the author of the original opinion following petitioner's direct appeal, concluded that petitioner was ineligible for parole, stating:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B1).
>
> (2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B1).
>
> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence.

Ramdass v. Commonwealth, 450 S.E.2d at 361.

It did not seem to bother Justice Whiting that on January 29, 1993, although judgment had not been entered on the robbery or murder of Kayani, petitioner had been convicted.

Petitioner essentially presents four arguments in support of the position that the court's failure to allow consideration of petitioner's parole ineligibility violated his Eighth and Fourteenth Amendment rights: first, that the Virginia Supreme Court decision was ultra vires, arguing that it is for the parole board to determine parole eligibility; second, that the Virginia Supreme Court decision was arbitrary, arguing that it was internally inconsistent, ignored Virginia authority, and contravened the plain language of the statute; third, that to deny the jury the information violates petitioner's Eighth Amendment rights; and fourth, that both the trial court and the Virginia Supreme Court acted arbitrarily in the actual imposition of the sentence since, at that point in time, petitioner had not only been convicted of the predicate offenses involved in the trial which is the subject of this action, but had been tried and sentenced for a fourth robbery at the Bragg Hotel and was, thus, unquestionably ineligible for parole.

The respondent treats the *Simmons* claim as *de minimis*.

In a two and one-half page reply, one full page is devoted to a long quote from the opinion. The respondent

relies almost exclusively upon the argument that the finding of parole ineligibility is a finding of historical fact entitled to a presumption of correctness, citing *Sumner v. Mata*, 449 U.S. 539 548-49 (1981), and concludes that petitioner's arguments, which are different from those presented to the Virginia Supreme Court, are now barred from review. The state seems to take great comfort in the fact that upon remand, when petitioner's counsel were entitled to file a reply brief in response to the Commonwealth's argument that petitioner was not ineligible for parole, they did not do so. However, until the Supreme Court determined, in fact, that petitioner was not eligible for parole, there was no issue of parole eligibility to which petitioner was obligated to respond. After all, the prosecutor never suggested to the trial court that petitioner was parole ineligible in the course of objecting to a response to the jury's question in language other than that provided by the Virginia Model Jury Instructions.

Until the Virginia Supreme Court determined that petitioner was parole ineligible, the issue did not exist.

Petitioner's reply brief essentially repeats the arguments raised in the petition, except for an additional argument that if there are any defaulted claims that pertain to the *Simmons* issue and which were not raised by state habeas counsel, petitioner argues that state habeas counsel were constitutionally ineffective, and petitioner is entitled to raise such matters herein. The issue is moot. The case upon which petitioner relies, *MacKall v. Murray*, 109 F.3d 957 (4th Cir. 1997), which suggested entitlement to effective assistance of counsel in the first habeas proceeding, was vacated in *MacKall v. Angelone*, 131 F.3d 442, 449 (1997), when the Fourth Circuit said, "[b]ecause

MacKall has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective. Consequently federal habeas review of those claims is barred."

The respondent's reply adds nothing to the argument.

Simmons is an extremely important constitutional case. It establishes a principle that goes beyond the narrow nature of the holding. In *Simmons*, the sole question was whether a defendant, facing the death penalty and then statutorily ineligible for parole under state law, had the right to inform the jury of his parole ineligibility when the state relied upon his alleged future dangerousness in seeking the death penalty.

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign for the imposition of the death penalty.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Stewart said:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned

> determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id. at 190.

In *Gardner v. Florida*, 430 U.S. 349 (1977), petitioner was sentenced to death based upon an aggravating factor contained in a presentence investigation report that the Court had ordered, but portions of which were not disclosed to or requested by counsel for the parties. In setting aside the conviction, the Court stated, succinctly, "[w]e conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), a death penalty was set aside because the limited range of mitigating circumstances that could be considered by the sentencer under the Ohio death penalty statute was deemed to be incompatible with the Eighth and Fourteenth Amendments. The Court concluded that except in the most unusual of circumstances, a sentencer may not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense proffered as a basis for a sentence less than death.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the trial court refused, as a matter of law, to consider in mitigation circumstances concerning defendant's childhood and certain emotional disturbances, and found that the only mitigating circumstance was his youth. In setting aside the sentence, Justice Powell said

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.

Id. at 113-14.

In *California v. Ramos*, 463 U.S. 992 (1993), the Court addressed the issue of whether it was constitutional to require that the trial judge inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the governor to a sentence that includes the possibility of parole, thus informing the jury that a prisoner sentenced to life without parole could eventually gain freedom. In permitting the disclosure, the jury received nothing more than an accurate statement of California law. In upholding the right of the state of California to so inform a jury, the court stated "[t]he Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." *Id.* at 1004

In *Barclay v. Florida*, 463 U.S. 939 (1983), petitioner was sentenced to death by the trial court, contrary to the jury's advisory recommendation that petitioner be sentenced to life. In written findings, the trial judge concluded that petitioner's behavior in the course of committing the crimes, and the nature of the crimes themselves, all of which were aggravating factors, were not offset by any mitigating factors and that the death

penalty was the o[illegible] appropriate sentence. The judgment was ultimately affirmed by the Florida Supreme Court and subsequently by the United States Supreme Court. In so doing, Justice Rehnquist noted that "[t]he United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder." *Id.* at 949. The Chief Justice went on to state:

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Id. at 950 (quoting *Zant v. Stephens*, 462 U.S. 8962, 874 (1983)).

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court said, "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.* at 306.

Finally, prior to *Simmons*, *Skipper v. South Carolina*, 476 U.S. 1 (1986) was decided. In that case, the trial court ruled that evidence that the defendant has made a good adjustment to confinement was irrelevant and inadmissable, and the testimony of two jailors [sic] and a regular visitor to the jail to that effect was excluded by the trial

court. Thereafter, the defendant was sentenced to death. In reversing the conviction, the Supreme Court said

> The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses – and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

Id. at 8.

Thus, we arrive at *Simmons*. In *Simmons*, as in the case before the Court, the state relied on future dangerousness as a factor for the jury to consider in determining whether Simmons should be sentenced to death or given life imprisonment for the murder of an elderly woman. *Simmons*, 512 U.S. at 157. Petitioner in that case presented evidence that his future dangerousness was limited to

elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. However, he was unable to persuade the trial court to give the jury an instruction which advised them that he was ineligible for parole under South Carolina law. *Id.* at 158.

During deliberations in the sentencing phase of the case, the jury posed the question of whether life imprisonment carried with it the possibility of parole. As in Virginia, the court instructed the jury not to consider parole in reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Simmons* at 160. Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue on appeal was whether the jury was entitled to know that petitioner was, in fact, ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. There are five separate opinions in the case. Justice Blackman wrote the opinion for the Court, in which Justices Stevens, Souter, and Ginsburg joined. They stated: "We think it clear that the state denied petitioner due process. . . . where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase." *Id.* at 163. They continued:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a

> defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause. . . .

Id. at 162-66.

They concluded: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165-66.

In a concurring opinion, Justice Souter addressed the "need for heightened reliability," asserting that a jury is entitled to know "the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives." *Id.* at 172 (Souter, J., concurring). Justice Stevens joined in the concurrence.

In a second concurring opinion, Justice Ginsburg wrote:

> This case is most readily resolved under a core requirement of due process, the right to be heard. . . . defendant's right to be heard means that he must be afforded an opportunity to rebut the argument. . . . To be full and fair, that opportunity must include the right to inform the jury,

> if it is indeed the case, that the defendant is ineligible for parole.

Id. at 174 (Ginsburg, J., concurring) (citations omitted).

Finally, in a concurring opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, the Court stated:

> [D]espite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177.

Thus the theme in all of the cases, concluding with *Simmons*, is dual: First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer, (*Skipper, McCleskey, Barkley, Eddings, Lockett*), and second, that a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, (*Gardner, Simmons*), and the opportunity to rebut the same (*Gardner, Lockett, McCleskey, Skipper, Simmons*). In fact, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, (*Ramos*), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

Applying *Simmons*, and its predecessors, to the case now before the Court, the Court finds that *Simmons* is controlling and that petitioner's case should have been remanded to the Circuit Court of Fairfax County for resentencing.

A writ of habeas corpus may not be granted:

> [W]ith respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

28 U.S.C. § 2254(d).

Recognizing this, the Court finds that the case of *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994), represents "a decision . . . contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," and constitutes "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1) and (2).

There are two elements of the decision which pose a problem. First, there is a bold determination that petitioner is not parole ineligible. Without regard to who has the ultimate authority to make that decision, it is fair to say that parole eligibility, in the context of the appellate

issue raised, is at least a mixed question of law and fact, and thus, the judgment was within the authority of the Virginia Supreme Court. Having said that, the judgment is puzzling.

The Virginia Supreme Court relied upon section 53.1-151(B1) of the Virginia Code, and the statutory language establishing parole ineligibility in the event of three convictions for the defined offenses. It then went on to conclude that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death" that petitioner had only two qualifying convictions – the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7-11 and murder of the 7-11 clerk, the very offenses still before the trial court for resolution. It concluded that the Domino's Pizza conviction did not qualify because even though petitioner had been sentenced to serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza jury verdict, which preceded commencement of the trial, does not constitute a conviction for purposes of ineligibility for parole, how then could the immediate offenses for which petitioner was still being tried constitute a second predicate conviction?

The second puzzling part of the decision has to do with the definition of the phrase "conviction." In a terse two-line statement, the Supreme Court stated

> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code section 53.1-151(B1).

Ramdass, 450 S.E.2d at 361.

The only case cited in support of the decision is *Smith v. Commonwealth*, 113 S.E.2d 707, 709 (Va. 1922), a case turning on the issue of what constitutes a conviction for the purpose of removing a constitutional officer from public office.

However, there are other significant Virginia cases which address the issue in a far more appropriate context.

In *Fields v. Commonwealth*, 361 S.E.2d 359 (Va. 1987), the Virginia Court of Appeals found that a convicted felon, testifying before the imposition of sentence, was "convicted" for purposes of impeachment. *Id.* at 361.

The *Fields* court relied upon *Lincoln v. Commonwealth*, 228 S.E.2d 688 (1976), a case in which the Virginia Supreme Court held that two accomplices, who had testified against a co-defendant and who had entered guilty pleas and stood convicted but had not been sentenced, were "convicted" felons for the purpose of attacking their credibility.

In *Blair v. Commonwealth*, 66 Va. (25 Gratt) 850 (1874), the court concluded that under the Constitution of Virginia, the governor has the authority to pardon the

person convicted of a felony before the sentence is passed; it is the act of conviction by the jury that governs.

In *United States v. Hartwell*, 26 F.Cas. 196, an 1869 decision of the Circuit Court for the District of Massachusetts, the issue was addressed by the court stating, "[c]onviction may accrue in two ways, either by the party confessing his offense and pleading guilty, or by his being found guilty by the verdict of a jury." *Id.* at 201 (citing 4 Blackstone's Commentaries 362). "Omission to sentence the principal defendant cannot make any difference as to the effect of the plea, as it is well settled that the conviction of the principal is sufficient without any judgment to constitute *prima facie* evidence of his guilt in a trial of the accessary. *Id.* In arriving at this opinion, the Massachusetts court cites *Commonwealth v. Williamson*, 2 Va. Cas. 211, an 1820 Virginia opinion.

In *Deal v. United States*, 508 U.S. 129 (1993), involving multiple counts of bank robbery and carrying and using a firearm in the commission of a crime, defendant faced the certainty of enhanced punishment for violation of 18 U.S.C. § 924(c)(1), involving the use of a firearm during and in relation to a crime of violence. Petitioner argued that his multiple convictions arose in a single proceeding and did not permit the sentence enhancements authorized by the statute. Justice Scalia, delivering the opinion of the court, made clear that statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* at 132. Following an analysis of petitioner's arguments, Justice Scalia concluded "[i]n the context of section 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of

guilt by a judge or jury that necessarily preceeds [sic] the entry of a final judgment of conviction." *Id.*

In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), a conviction for a state felony of carrying a concealed handgun, which was subsequently expunged following petitioner's successful completion of a period of probation, nevertheless constituted a "conviction" for the purpose of a subsequent revocation of a federal firearms dealer and manufacturer license. Justice Blackman [sic] stated:

> [E]xpunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the state has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Clearly, firearms disabilities may be attached constitutionally to an expunged conviction . . . and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious.

Id. at 115 (citations omitted).

It is the conviction, the act of finding an individual guilty, that was addressed by the legislature, without the requirement of an intervening sentence in section 53.1-151(B).

Finally, though the distinction was not acknowledged by the Virginia Supreme Court, it is critical to the resolution of this issue to note that the statute in question, section 53.1-151(B1) of the Virginia Code, addresses "any person convicted . . . ," as opposed to "convicted and

sentenced." As Judge Clarke noted in *Krawetz v. Murray*, 742 F. Supp. 304 (E.D. Va. 1990),

> The starting point in any case involving the interpretation of a statute is the statute itself. When, as here, the language of the statute is clear, the court must enforce it according to its terms, for rewriting the statute is not the province of the judiciary. Giving effect to the plain meaning of the language used in Virginia Code 53.1-151, it is pellucidly clear that in order to increase a defendant's time before being eligible for parole, that defendant must not only have been convicted of a felony, but also sentenced and committed to a "state correctional facility" or some other institution under the control of the Department of Corrections. This Court can only presume that the legislature of Virginia intended to give Virginia judges leeway to exercise some discretion to sentence some convicted felons more leniently than others.

Id. at 307.

Here, "the language of the statute is clear," and a defendant, convicted three times, is ineligible for parole. Petitioner had been convicted and sentenced twice on January 29, 1993. The actions of the jury contemplating his fate resulted in his third "conviction" for murder, and a sentence of life would have resulted in petitioner being parole ineligible.

Further, it is appropriate to note that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was "a possibility of parole at some time before his natural death," logically suggesting that the jury believed that if they

gave him a life sentence, that it would be a significant sentence but that there was a possibility of release.

This Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. The language of the Justices constituting the seven person majority makes clear their concern that a jury be correctly informed about a defendant's status when the choice is between the imposition of the death penalty or the imposition of a "life" sentence. Given the fact that there is no provision in law that defines a "life" sentence, nor was one required in Virginia, the jury had no way of knowing how much time that involved.

On January 29, 1993, the court, the prosecutor, the defense team, and the jury all knew that petitioner had a dysfunctional up-bringing, devoid of necessary physical, emotional, and moral support; that he began his criminal career at an early age; that he was an abject failure on parole; and that he had violent propensities. He had little going for him except his age. The jury manifested their concern about whether, before he died, he could be released. *Simmons* stands for the proposition that the jury, balancing life and death, had the right to an informed answer.

Had the trial court informed the jury of the two provisions of section 53.1-151(B1) of the Virginia Code, the jury would have known that as a result of the number of convictions received by petitioner, he was then ineligible, by statute, for parole and second, that because he had been convicted of murder, that he would required [sic] to serve, as an absolute minimum, twenty-five years. It is difficult to imagine how either side could have been

prejudiced by the conveyance of such information to the jury, and the jury would have been allowed to make an informed decision, precisely the point in *Simmons*.

The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion, requires an inconsistent treatment of two separate convictions, and contradicts more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict.

III. RECOMMENDATION

For the foregoing reasons, the Court finds that all of petitioner's claims, save and except Claim 1, should be DISMISSED, but that a petition for writ of habeas corpus should be GRANTED as to Claim 1, and the case remanded to the Circuit Court of Fairfax County for the sole purpose of resentencing.

It is further recommended that the Court DENY petitioner's request for an evidential hearing in light of the complete trial and appellate record and the total absence of substantive issues requiring factual development in the context of collateral review.

IV. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing

findings and recommendations within 10 days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three days permitted by Rule 6(e) of said rules. A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/ James E. Bradberry
UNITED STATES MAGISTRATE JUDGE

Newport News, Virginia
February 26, 1998

Bobby Lee RAMDASS, Petitioner,

v.

Ronald J. ANGELONE, Director of Virginia Department of Corrections, Respondent.

No. CIV. A. 2:96CV831.

United States District Court,
E.D. Virginia,
Norfolk Division.

Aug. 14, 1998.

Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Capital Habeas Litigation Section, Richmond, VA, for Ronald J. Angelone.

John M. Ryan and Nash F. Bilisoly, Vandeventer, Black, Meredith and Martin, LLP, Norfolk, VA, Michele J. Brace, Robert Edward Lee, Jr., Mark E. Olive, Virginia Capital Representation Resource Center, Richmond, VA, for Bobby Lee Ramdass.

OPINION AND FINAL ORDER

JACKSON, District Judge.

In January, 1993, Petitioner was convicted in the Circuit Court of Fairfax County, Virginia for the September, 1992 murder of Mohammad Z. Kayani, a convenience store clerk. Pursuant to the jury's recommendation, on April 2, 1993, the court sentenced Petitioner to death. Subsequently, Petitioner exercised his state appeals to no avail. On March 11, 1997, Petitioner filed an amended petition for a federal writ of habeas corpus, pursuant to

28 U.S.C. § 2254,[1] alleging violations of federal constitutional rights during his conviction and sentencing. This matter comes before the Court on Respondent's April 28, 1997 motion to dismiss the petition. On June 3, 1997, Petitioner filed a response to Respondent's motion to dismiss. On June 26, 1997, Respondent filed a reply to Petitioner's response.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia, the matter was referred to a United States Magistrate Judge for Report and Recommendation ("R & R"). On February 27, 1998, the Magistrate Judge filed his R & R. He found merit in one ground in the petition and recommended that the motion to dismiss be denied and that Petitioner's case be remanded for resentencing.

By copy of the R & R, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On March 30, 1998, this Court received "Petitioner's Objections to Magistrate Judge's Report and Recommendation" and "Respondent's Objections to the Magistrate Judge's Report and Recommendation." On April 13, 1998, both parties filed respective replies to the objections.

With some exceptions, Petitioner objects to the Magistrate Judge's recommendations to deny certain claims on the basis of procedural default. Of the claims the Magistrate Judge addressed on the merits, Petitioner does

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[1] On February 14, 1997, Petitioner filed his initial petition.

not contest the ultimate recommendation to order Petitioner's resentencing; however, he does object to the recommendations to deny the remaining claims on the merits. Further, Petitioner maintains that he is entitled to conduct discovery and present evidence on his claims which were denied on the merits. Respondent disagrees with the standard the Magistrate Judge utilized in concluding that certain claims were not procedurally defaulted and the recommendations that certain claims were not procedurally defaulted. Additionally, Respondent objects to the ultimate recommendation to remand Petitioner's case for resentencing. Both parties object to the standard of review the Magistrate Judge applied when evaluating claims on the merits.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the Magistrate Judge's R & R to which the parties specifically objected. The Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I. FACTS AND PROCEDURAL HISTORY

The R & R contains a detailed statement of the facts surrounding the crime, Petitioner's conviction and sentencing, and subsequent state appeals. (R & R 2-17.) The Court adopts the Magistrate Judge's explication of facts, with some modifications. The facts and procedural history are as follows.

A. Facts

During the night of September 1, 1992, and early morning of September 2, 1992, Petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh,[2] Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including Petitioner, decided that they would rob persons at a 7-Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7-Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and to not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes, Kool Aid and lottery tickets from the store's stock.

After Petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f – head

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[2] For this crime, Singh had plead guilty to murder as a principal in the second degree, robbery, and use of a firearm in the commission of a robbery as a principal in the second degree. He testified that he faced three life sentences plus six years. (1/27/93 Tr. 202.) In exchange for his testimony, charges for other robberies in which he had participated were dropped.

off.[3]" *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 568 (Va.1993). At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206-07.) Immediately thereafter, Singh, standing behind Petitioner, saw Petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211-12.) Testifying about the precise moment of the shooting, Singh stated that Petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after Petitioner shot Kayani, Ramirez testified that he returned from a back room in the store. Ramirez saw Petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.)[4] Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Petitioner to "[c]ome on." (*Id.* at 146.) However, Petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the clicking of the gun as Petitioner left. (1/27/93 Tr. at 125, 129-30.)

When they got in the car, Ramirez heard Petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, Petitioner told Ramirez,

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[3] Another employee of the 7-Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

[4] Later, Ramirez heard Petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.)

"[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146-47.)

Singh, a co-owner of the gun with Petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. (*Id.* at 213.) Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 245, 248.) Mason testified that the 9 millimeter cartridges Petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Consequently, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250-51.) Mason further testified that when the muzzle was pointed up, the cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

On direct, after stipulating as to her expertise, the medical examiner testified that the bullet which killed Mr. Kayani entered the left side of his head, just above the left ear, traveled forward, upward and rightward exiting out the right side of his head. (*Id.* at 99-100.) On cross examination, the medical examiner was questioned in more detail about the track of the bullet through the head and revealed that powder burns and debris were found on Kayani's head. (*Id.* at 102.)

Based on the evidence, the jury convicted Petitioner of capital murder and the use of a firearm in the commission of a felony. The case proceeded to the capital sentencing phase. The Commonwealth, in seeking the death penalty, relied solely upon the "continuing serious threat

to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of Petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by Petitioner and threatened with a gun during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by Petitioner. At the time of trial, Petitioner had been convicted of the Pizza Hut and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7-Eleven crimes, Petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

In opening statements, which had been reserved, defense counsel argued that Petitioner need not be sentenced to death on the basis of future dangerousness because he was already required to serve at least 99 years in jail. The length of the term precluded release and eliminated any future threat to society. Toward the end of the opening, trial counsel stated: "Bobbie Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future." (1/29/93 Tr. 98.)

Trial counsel informed the jury of Petitioner's extensive juvenile record. Beginning in 1985, Petitioner came before the Court for a purse snatching, for which he received probation, (1/29/93 Tr. at 198-99); theft of a

moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he received an adult sentence to Southampton prison, (1/29/93 Tr. at 17-18, 202). The jury also learned that Petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149-51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85-86, 202).

Furthermore, the defense presented evidence of a bleak, abusive, unstructured childhood. Petitioner was physically and emotionally abused and raised in conditions of severe deprivation. There was no positive guidance.

Petitioner's brother, Mark Ramdass, testified on Petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and to try to keep him out of trouble. (1/29/93 Tr. 103-05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, Petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when Petitioner was

born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges. She also confirmed that she twice lost custody of her children for neglect. (1/29/93 Tr. 227-28.) She described how Petitioner was physically abused by a boyfriend and how she taught petitioner to defend himself. She admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She had prepared the probation report following Petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of Petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on Petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of Petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner did not call the court-appointed health expert to testify as to Petitioner's mental health or mitigating circumstances. After an evaluation, the court-appointed expert concluded that there were no mitigating circumstances in Petitioner's case.

Finally, though Petitioner did not testify in the guilt phase, Petitioner did testify in the sentencing phase. (1/29/93 Tr. 132-216.)

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding,

they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278). The court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.) The Court did not directly answer the jury's question.

Ultimately, on January 30, 1993, the jury unanimously recommended a sentence of death for Petitioner. On April 2, 1993, the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder.

B. Procedural History

On September 2, 1992, Petitioner murdered Muhammad Kayani, a clerk employed at a 7-Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7-Eleven robbery and murder. On September 21, 1992, Petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued. On November 2, 1992, the trial court denied Petitioner's request to make an ex parte showing of need for expert assistance. (11/2/92 Tr.

20-32.) On December 8, 1992, the trial court denied Petitioner's motion for a physical exam concluding that there was a lack of information sufficient to establish the need for an exam. (12/8/92 Tr. at 6.) Counsel then proffered that he needed the exam to determine whether Petitioner suffered from a reflexive disorder. (*Id.* at 7-8.) Next, the trial court denied Petitioner's request for appointment of an expert investigator, but did appoint a third attorney to the defense team. (*Id.* at 22.) Next, the trial court declined to order the Commonwealth to turn over to Petitioner statements Petitioner claimed were exculpatory. (*Id.* at 44.)

The matter came on for trial on January 26, 1993. The first day consisted of jury voir dire and selection. At trial, Petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictment, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidentiary portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony. Petitioner was sentenced to four years in the penitentiary for the latter crime. Following the jury verdict, the court found Petitioner guilty with respect to Count II, robbery, finding on the record that Petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, sua sponte, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury

heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of the preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. Sentencing was continued from that date, however, until April 2, 1993, at which time the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict for use of a firearm in the commission of a felony; and life for the robbery, incident to Petitioner's plea of guilty.

Trial counsel pursued a direct appeal on behalf of Petitioner, assigning the following errors:

> 1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
>
> 2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
>
> 3. The Trial Court erred in granting an extended reasonable doubt instruction.
>
> 4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*,

tried in the same circuit and approved by the Virginia Supreme Court.

5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.

6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.

7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B-S" which instructed the jury that they must all agree that the Defendant would be a future danger.

8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E-S" which instructed they [sic] jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.

9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation of § 19.2-264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.

10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.

11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.

12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.

13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, and private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to voir dire the jury regarding specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for in-camera requests for expert witnesses in violation of his Fourth. Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation

of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7-11; as to the specific location of Mr. Ramirez on dates preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (Va.1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially

exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and ruled that where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

As presented by Petitioner to the Supreme Court of Virginia on remand, the sole issue in Simmons was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that Simmons was not raised in the trial court; that Petitioner was eligible for parole and Simmons, therefore, did not apply; and that Simmons was irrelevant because the sentencer can always consider parole ineligibility. On November 4, 1994, the Supreme

Court rejected Petitioner's claim, found that Petitioner was eligible for parole, and concluded that Simmons did not apply. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (Va.1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085, 115 S.Ct. 1800, ___ L.Ed.2d ___ (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth. On August 30, 1995, Petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper voir dire, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to

strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a Simmons error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

On January 19, 1996, the court denied an ex parte motion for expert assistance and an investigator. On March 18, 1996, the court denied the habeas petition without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that Petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to Petitioner, and that the trial court denied Petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the Simmons claim was well articulated. The petition for rehearing was denied June 7, 1996.

The Circuit Court of Fairfax County set Petitioner's execution for August 28, 1996. On June 25, 1996, Petitioner filed a motion to stay execution, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, Petitioner moved for a stay of execution and for leave to proceed in forma pauperis, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

II. CLAIMS PRESENTED

Petitioner sets forth the following claims as grounds for federal habeas relief.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The Simmons claim).

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was either nonexistent or internally inconsistent.

A. Petitioner was unreasonably advised not to testify.

B. Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent.

C. Trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner.

D. Trial counsel failed to cross examine the prosecution's "firearms identification" expert.

E. Trial counsel failed to obtain expert assistance.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

A. Trial counsel failed to request schedule adjustments which would have created Petitioner's parole ineligibility.

B. Trial counsel failed to challenge the determination that Petitioner was eligible for parole.

4. Trial counsel failed to conduct adequate voir dire.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

6. Trial counsel failed to adequately prepare for the penalty phase.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

F. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

G. The Virginia death penalty statute on its face, and as applied, violates the Sixth, Eighth and Fourteenth amendments.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

K. Virginia's capital murder sentencing statute is unconstitutional.

III. PROCEDURAL DEFAULT

Title 28 U.S.C. § 2254(b) requires exhaustion of claims before presentment to federal courts. A claim is exhausted if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Respondent objects to the standard the Magistrate Judge employed for determining when a claim has been procedurally defaulted. In addition, in most cases, each party objected to the Magistrate Judge's underlying recommendation as to whether a particular claim was procedurally defaulted. Accordingly, the Court will first outline the rules of procedural default and its exceptions.

The Court will then determine whether each individual claim is preserved or defaulted.

Standard for Procedural Default

This Court may not review claims that have been clearly and expressly defaulted under an independent and adequate Virginia state procedural rule. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va. S.Ct. R. 5:25; *Coppola v. Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S.E.2d 10 (Va.1981). Further, excepting ineffective assistance of counsel claims which may first be presented on collateral review, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings. *Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698, 699 (Va.1983); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (Va.1974). Finally, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code § 8.01-654(B)(2).

In his motion to dismiss, Respondent argued that certain arguments supporting some of Petitioner's claims were never presented to the state courts and, therefore, the arguments were procedurally defaulted pursuant to Va.Code § 8.01-654(B)(2). The Magistrate Judge concluded: "A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings." (R & R 26.) Additionally, in several instances, the Magistrate Judge stated that where a claim was raised in the state proceedings, though

the argument was not necessarily in the exact same nature, tenor or form, the matter was not procedurally defaulted. (*See, e.g.*, R & R 33, 36, 37.) *Citing Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998) and *Mallory v. Smith*, 27 F.3d 991 (4th Cir.1994), Respondent objects and reiterates his contention that the argument presented to the federal court must be precisely the same argument presented to the state courts. Respondent claims that the Magistrate Judge considered arguments which were never presented to the state courts, but "now are presented under the heading of a claim that arguably was presented in state court."

Virginia Code § 8.01-654(B)(2) establishes a bright-line rule providing that a habeas petition "shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." The Fourth Circuit has held that both the operative facts and legal principles, i.e. the argument, must be presented to the state courts or else the claim is barred from federal review. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). Accordingly, Respondent's objection to the standard the Magistrate Judge used to for determinations of procedural default is SUSTAINED.

Excuse of Procedural Default

Despite the rule barring federal review of claims which have been defaulted on adequate and independent

state grounds, two exceptions exist which excuse procedural default and permit federal review. First, where a petitioner can show both cause for and prejudice resulting from his default, a federal court may review a defaulted claim. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. With respect to "cause," a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). With respect to "prejudice," a petitioner must show that the error worked to his "actual and substantial disadvantage," not merely that it created a "possibility of prejudice." *Id.* at 494, 106 S.Ct. 2639 (emphasis in original), *quoting United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Second, if a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal to do so would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. To meet the miscarriage of justice exception, the petitioner must show either that a constitutional violation has probably resulted in the conviction of one who is actually innocent, *Schlup*, 115 S.Ct. at 867, or, for those petitioners who are sentenced to death, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would find him eligible for the death penalty. . . . "[5] *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

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[5] In his motion to dismiss, Respondent argued that the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent pointed to 28 U.S.C. § 2264(a). Respondent did not pursue this argument in his objections and, for two (2) reasons, the Court offers no opinion on this argument. First, it is not clear to this Court whether Congress's intention in writing § 2264(a) was to completely eliminate the "actual innocence" exception in capital cases or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. Second, because this Court has previously found that Virginia is not an "opt-in" state, (Mem. Op. and Order, Dec. 6, 1996.), § 2264(a) does not apply.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the eighth and fourteenth amendments (The Simmons claim).

The Magistrate Judge found that this claim was not procedurally defaulted because, regardless of the precise nature or form of the argument, the issue of whether the sentencing jury was entitled to know Petitioner's parole eligibility status was presented both on direct appeal and in the state habeas proceeding. (R & R 33-34.) Respondent objects contending that the Magistrate Judge considered legal arguments which were never presented to the state courts and, therefore, may not now be considered by this Court.

At no point has Respondent directed the Court's attention to any new arguments which should have been raised in state court. In his response to the motion to dismiss, Petitioner identified two purportedly new arguments: (1) on remand from the United States Supreme

Court, the Virginia Supreme Court exceeded its constitutional authority and determined Petitioner's parole eligibility status and (2) on remand from the United States Supreme Court, the Virginia Supreme Court's decision that Petitioner was parole eligible was arbitrary. Petitioner argued that neither claim was procedurally defaulted because Petitioner could not challenge an error which did not arise until the Virginia Supreme Court handed down its opinion on the Simmons issue, and, once the decision was rendered, Petitioner was not required to submit a discretionary petition for rehearing in order to exhaust his remedies. In his reply to the Petitioner's response, Respondent summarily dismissed Petitioner's arguments as "silly," claiming that nothing prevented Petitioner from raising these arguments to the Virginia Supreme Court and, therefore, they are now barred from federal review.

The Court finds that the arguments have been procedurally defaulted. After the Virginia Supreme Court issued its decision declaring that Petitioner was parole eligible, Petitioner did not request reconsideration of the decision, rather, Petitioner presented these allegedly new arguments to the United States Supreme Court on an unsuccessful second request for review. Pursuant to *Slayton*, 215 Va. 27, 205 S.E.2d 680, Petitioner could have presented the arguments to the Virginia Supreme Court in his initial habeas petition because the issues could not have been raised at trial or on direct appeal. Petitioner, however, did not present the arguments; thus, the argument would now be procedurally defaulted pursuant to Va.Code § 8.01-654(B)(2). Accordingly, the arguments may not be considered by this Court, and Respondent's

objection is SUSTAINED. These new arguments will not be addressed on the merits, but the preserved Simmons issues will be discussed.

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

Petitioner claims that he was denied the constitutional right, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to the assistance of a mental health expert. The Magistrate Judge determined that the claim was procedurally defaulted because it was neither presented on direct appeal nor in the state habeas petition. (R & R 34-35.) Petitioner objects arguing that the language in the state habeas petition was a dual claim which clearly argued a violation of *Ake* in addition to ineffective assistance of counsel for failure to secure a mental health expert.

The Court finds that the Ake claim has been procedurally defaulted because it was not presented to the state courts. In his state petition, habeas counsel claimed that trial counsel was ineffective for failing to object to a court-appointed mental health expert who would not work with Petitioner and to put on expert mental health testimony. Petitioner did not, however, explicitly argue that the court-appointed mental health expert was ineffective. Accordingly, Petitioner's objection is OVERRULED. The Ake ineffective mental health expert claim will not be addressed on the merits.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

Petitioner's claim here is two-fold. First, Petitioner claims that trial counsel's strategy was ineffective because the choice of defenses was inconsistent.[6] Second, Petitioner claims that trial counsel's strategy was ineffective because they failed in four instances to produce any evidence on Petitioner's intent. The Magistrate Judge determined that any claim of ineffective assistance of counsel based on inadequate trial strategy was not presented to the state courts and, accordingly, was procedurally defaulted. (R & R 35.) Of the four instances in which Petitioner claims intent evidence should have been produced, the Magistrate Judge evaluated them individually and determined that two were procedurally defaulted: (1) that Petitioner was unreasonably advised not to testify and (2) that, as to the location of the bullet, trial counsel was ineffective in failing to obtain experts to assist in the defense of the case.[7] (R & R 35-36.) Petitioner

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[6] That is, it was ineffective for trial counsel to argue: "The bullet did not come from Defendant's gun but if you find that it did, then Defendant did not intentionally shoot the victim but did so accidentally."

[7] The Magistrate Judge reviewed on the merits the sub-claims that (1) trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent, (2) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner, (3) trial counsel failed to cross

objects arguing that the trial strategy claim is a "convenient umbrella" for the underlying sub-claims which were all presented to the state courts. Petitioner concludes, therefore, that both the trial strategy claim and the underlying sub-claims regarding intent evidence are preserved. With respect to any remaining ineffectiveness claims for failing to obtain expert assistance, which the Magistrate Judge found were not procedurally defaulted, Respondent objects.

The Court finds that the argument that the defenses were inconsistent is procedurally defaulted. In the state habeas petition, trial counsel was not charged with being ineffective for attempting to prove seemingly inconsistent defenses. Accordingly, Petitioner's objection is OVERRULED.

With respect to the claim of ineffectiveness for failure to present intent evidence, the Court finds that neither the claim itself nor the underlying sub-claims, excepting one, have been procedurally defaulted. Petitioner explicitly claimed in the state habeas petition that trial counsel was ineffective for not producing intent evidence. As to the claim of unreasonable advice not to testify, Petitioner clearly raised the issue in the state habeas petition and, additionally, in his motion to dismiss, Respondent addressed the claim on its merits. Finally, in reviewing Respondent's motion to dismiss, the Court finds that the only portion of the argument regarding expert assistance which Respondent claimed was procedurally defaulted

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examine the prosecution's firearms identification expert and (4) trial counsel failed to obtain expert assistance. (R & R 45-53.)

was that pertaining to the location of the bullet. Respondent did not argue that the remaining arguments regarding lack of expert assistance were procedurally defaulted, but instead addressed them on the merits. Consequently, the defense of procedural default was waived, *Trest v. Cain*, 522 U.S. 87, ___, 118 S.Ct. 478, 480, 139 L.Ed.2d 444 (1997), and cannot now be raised on objection to the R & R. Accordingly, Petitioner's objection is SUSTAINED and Respondent's objection is OVERRULED.

2. Trial counsel failed to object to a co-defendant's testimony about his life sentence.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 53.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

The Magistrate Judge determined that trial counsel's failure to establish parole ineligibility by failing to request rescheduling of the trial was procedurally defaulted, but that failure to challenge the determination that Petitioner was not ineligible for parole was not procedurally defaulted because it was related to the Simmons claim. (R & R 36.) Respondent objects to the

Magistrate Judge's latter determination. Petitioner concedes that neither claim was raised in the state proceedings and further, in light of the fact that the Fourth Circuit *vacated Mackall v. Murray*, 109 F.3d 957 (4th Cir.1997) in *Mackall v. Angelone*, 131 F.3d 442 (4th Cir.1997) (en banc), does not object to the Magistrate Judge's determinations. Accordingly, Respondent's objection is SUSTAINED. Neither argument will be addressed on its merits.

4. Trial counsel failed to conduct adequate voir dire.

On page 37 of the R & R, the Magistrate Judge stated that all the arguments regarding the effectiveness of trial counsel's jury voir dire were preserved. Respondent objects to this statement arguing that the Magistrate Judge should have found all claims to be procedurally defaulted, excepting those related to jurors Amelia, Powell, Ross and the questioning of the entire panel regarding mitigating factors. On page 56 of the R & R, the Magistrate Judge stated that because the claims related to jurors Amelia, Powell, Ross and the questioning of the entire pool regarding mitigating factors had been raised during the state proceedings, only those claims would be considered. With the exception of these, the Magistrate Judge declined to address any other jury voir dire issues. Accordingly, Respondent's objection is OVERRULED. Review of the merits of this claim will be limited to the issues surrounding jurors Amelia, Powell and Ross and the questioning of the entire pool regarding mitigating factors.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 58.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

6. Trial counsel failed to adequately prepare for the penalty phase.

This claim encompasses two (2) arguments: trial counsel was ineffective for failing to object to the court-appointed mental health expert and trial counsel was ineffective for failing to present expert mitigating evidence. The Magistrate Judge determined that the former argument was procedurally defaulted, but the latter preserved. (R & R 59.) Petitioner objects raising two arguments. First, Petitioner urges that the Magistrate Judge's conclusion is inconsistent with the previous determination that the ineffectiveness claim was preserved. (R & R 34.) Second, Petitioner claims that Respondent waived procedural default.

The Court finds that the claim is not procedurally defaulted. The ineffective assistance of counsel claim was clearly raised in the state habeas proceeding where Petitioner claimed that trial counsel failed to object to the court-appointment mental health expert who would not work with the defense and failed to put on any expert

mitigating testimony. Accordingly, Petitioner's objection is SUSTAINED. Both arguments will be addressed on the merits.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 62.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 68.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

F. The refusal to allow Petitioner exculpatory statements, the refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's conclusion that, with the exception of the assertion of the right to an in camera hearing, this claim was procedurally defaulted. (R & R 31-33.) Accordingly, the Court adopts the findings made by the Magistrate Judge. The preserved claim will be reviewed on the merits.

G. The Virginia death penalty statute on its face and as applied violates the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim had not been procedurally defaulted. (R & R 37.) Respondent objects arguing that some of the arguments that the Magistrate Judge considered were new arguments which were never presented to the state courts. Turning to Respondent's memorandum in support of his motion to dismiss, the Court finds that Respondent argued that five (5) specific arguments for unconstitutionality were procedurally barred because they were not raised in the state proceedings. They are: (i) that jurors are not informed that a life sentence will be imposed unless the jury recommends death; (ii) that the "vileness" aggravating factor is vague; (iii) that death by legal [sic] injection is cruel and unusual; (iv) that the sentencing statute does not require that a death sentence be set aside if a court finds "good

cause;" and (v) that the sentencing statute allows for hearsay in the post-sentence report.

On direct appeal, Petitioner argued (1) that death by electrocution is cruel and unusual and (2) that the Virginia death penalty statute is unconstitutional because "future dangerousness" is not meaningfully defined and no jury instruction is required in consideration of mitigating evidence. In his state habeas petition, Petitioner did not challenge the constitutionality of the death penalty statute. Accordingly, Respondent's objection is SUSTAINED. Those particular arguments will not be considered by this Court, but any remaining arguments will be evaluated on their merits.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 85.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that this claim was not procedurally defaulted because it had been raised both on direct appeal and in the state habeas proceedings.

(R & R 37.) Respondent objects arguing that the claim that trial counsel was inadequate for failing to object to the admission of unadjudicated conduct without a burden of proof instruction is a new claim which was not presented to the state courts.

The Court finds that the claim is not procedurally defaulted because it was clearly raised before the state courts. On direct appeal, Petitioner claimed that the trial court erred in failing to proffer to the jury an instruction which stated a burden of proof for consideration of unadjudicated misconduct. In the state habeas proceeding, Petitioner claimed that trial counsel was ineffective for failing to object to the admission of evidence of prior unadjudicated misconduct. Further, habeas counsel alleged that the trial court erred in permitting evidence of unadjudicated prior misconduct even without an objection to such evidence. Accordingly, Respondent's objection is OVERRULED.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

The Magistrate Judge determined that the issue of the sufficiency of the Virginia Supreme Court's proportionality review was procedurally defaulted, but that the issue of whether Petitioner's sentence was imposed under the influence of passion, prejudice or any other arbitrary factor or disproportionate was not procedurally defaulted. (R & R 33, 73.) Petitioner objects to the former conclusion. Respondent objects to the latter.

Va.Code § 17-110.1(C) mandates review of death sentences for proportionality and for passion, prejudice or arbitrariness, in addition to consideration of any errors alleged by a defendant. On direct appeal, Petitioner did not argue that either of these situations applied in his case. On direct review, the Virginia Supreme Court determined that Petitioner's death sentence was neither disproportionate nor influenced by passion, prejudice or arbitrariness. In his initial state habeas petition, Petitioner did not argue that the court had inadequately performed its review for passion, prejudice or arbitrariness, but did argue that the Virginia Supreme Court failed to adequately perform its proportionality review of his death sentence. The Virginia Supreme Court found the latter argument to be procedurally defaulted pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, but the court did not explain how and why *Slayton* applied to this claim. Given that the issue of whether the court adequately performed its review for proportionality could not be raised until such a review was conducted, logic dictates that the claim could not be raised until the state habeas petition was filed. Thus, the reasoning of the Virginia Supreme Court is perplexing. Nevertheless, this Court cannot review the quality of the decision.[8] It is axiomatic that federal courts do not review state decisions based solely upon adequate and independent state

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[8] Even if the Court did not find the claim procedurally defaulted, the Court finds no merit in this claim. The Fourth Circuit previously addressed the identical claim, holding that such a claim does "not provide sufficient constitutional grounds to warrant a writ of habeas corpus." *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir.1996).

law. Accordingly, Petitioner's objection is OVERRULED. Because Petitioner did not argue in his federal petition that the death sentence was imposed under passion, prejudice or arbitrariness or that the sentence was disproportionate, the Court finds that the claim is not properly before the Court. Accordingly, Respondent's objection is SUSTAINED. Neither argument will be considered on its merits.

K. Virginia's capital murder sentencing statute is unconstitutional.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 77.), thereby implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

IV. CLAIMS REVIEWED ON THE MERITS

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") is generally applicable to Petitioner's case, because his petition was filed well after April 24, 1996, the enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[9]

[9] The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. Virginia does not meet the qualifications of § 107, (Mem. Op. and Order, Dec. 6, 1996.), thus precluding its applicability to this case.

The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Both parties object to the standard of review as outlined by the Magistrate Judge. Petitioner objects arguing that in evaluating the Virginia Supreme Court's cursory, "no merit" state habeas ruling, the proper standard of review is de novo. Respondent objects to the Magistrate Judge's determination that mixed questions of law and fact (e.g. Petitioner's ineffective assistance of counsel claims) are to be reviewed de novo. Respondent argues

that, under the AEDPA, state court findings both of fact and of law are subject to deferential review.

Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by Petitioner, a state court decision that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Wright v. Angelone*, 151 F.3d 151, 156, No. 97-32, 1998 WL 394990, at *4 (4th Cir. July 16, 1998); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va.1997) (holding that § 2254(d) does not require an explanatory decision from the state court).

Nevertheless, the practical significance of the § 2254(d) new standard of review is lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1015 (E.D.Va.1997). In cases where there is no indication of how the state court came to its decision, it will obviously be more difficult for the federal court to determine whether the state court's ultimate determination involved an unreasonable application of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

If there is a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the de novo review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[10] However, the review of legal claims is still de novo in the sense that federal courts must independently determine whether the state court decision is correct under federal law. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the power of the federal judiciary to determine what the law is, as required by Article III of the United States Constitution.

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[10] Prior to passage of the AEDPA, review was de novo in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

The AEDPA did, however, alter habeas review by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Petitioner must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

In *Green v. French*, 143 F.3d 865 (4th Cir.1998), the Fourth Circuit interpreted the meaning of "contrary to" and "unreasonable application of."

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

> [A] decision represents an "unreasonable application of" precedent only when that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that give rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id.

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The Simmons claim).

The Magistrate Judge recommended that Petitioner's case be remanded for resentencing on the basis that, on remand from the United States Supreme Court, the Virginia Supreme Court's decision, *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360, limited the application of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, in a manner inconsistent with the language in *Simmons*, required an inconsistent treatment of two separate convictions of Petitioner, and contradicted

more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict. (R & R 113.) Respondent objects claiming that the Magistrate Judge clearly erred in recommending that the writ be granted on the basis of an error in state law. *See* 28 U.S.C. § 2254(d)(1). Petitioner does not object to the Magistrate Judge's recommendation, but expresses two (2) issues of concern.[11] First, Petitioner notes that, to the extent that Virginia state law was interpreted, the Magistrate Judge's decision was appropriate because the Virginia Supreme Court's decision was "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *See Richmond v. Lewis*, 506 U.S. 40, 50, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). Second, Petitioner clarifies that the right to inform the jury of his parole ineligibility status stemmed from both the Eighth Amendment and the Fourteenth Amendment.

The Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is OVERRULED. For the following reasons, the application for a writ of habeas

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[11] Petitioner also noted his concern with the Magistrate Judge's determination that the Virginia Supreme Court possessed authority and jurisdiction to calculate Petitioner's parole ineligibility because such an issue is a mixed question of law and fact. The Court, however, has determined that argument to be procedurally defaulted. *See supra* III.G.

corpus is GRANTED and Petitioner's case remanded to the Circuit Court for Fairfax County for resentencing.

1. *Simmons v. South Carolina*

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign in support of the imposition of the death penalty. The theme in all of the cases is dual. First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Second, a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, *see Simmons; Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the opportunity to rebut the same. *See Simmons; McCleskey; Skipper; Lockett; Gardner.* In addition to these themes, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1993), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

In *Simmons*, the defendant was convicted of the murder of an elderly woman. The state relied solely on "future dangerousness" as the basis upon which the jury should consider whether the defendant should be sentenced to death or given life imprisonment as punishment for his crimes. *Simmons*, 512 U.S. at 157, 114 S.Ct. 2187. The petitioner, however, presented evidence that his future dangerousness was limited to elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. *Id.* at 158, 114 S.Ct. 2187. Further, the petitioner requested that the court instruct the jury that, in his case, "life imprisonment" did not permit parole. *Id.* "To buttress his request, [the] petitioner proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility," *id.*, and, additionally, Petitioner presented evidence that (1) jurors believe a convicted murderer sentenced to "life imprisonment" will eventually be released from prison and (2) jurors indicate that the amount of time a convicted murderer would actually spend in prison is an important factor in choosing between life and death. *Id.* at 159, 114 S.Ct. 2187.

The trial court, however, denied the petitioner's request for an instruction regarding parole ineligibility. Further, the court denied a request for an instruction which indicated that the petitioner would remain in jail for the balance of his natural life. *Id.* at 159-60, 114 S.Ct. 2187.

During deliberations in the sentencing phase of the case, the jury asked whether life imprisonment carried with it the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The court instructed the jury not to consider parole in

reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Id.* Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue before the United States Supreme Court was whether the jury was entitled to know that the petitioner was ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. Justice Blackmun, writing for the plurality, stated:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163-64, 114 S.Ct. 2187. The opinion further stated: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165-66, 114 S.Ct. 2187.

Justice O'Connor, in an opinion concurring in the judgment and joined by Chief Justice Rehnquist and Justice Kennedy, stated:

> When the state seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177, 114 S.Ct. 2187.

2. "Unreasonable determination of the facts"

In this case, on January 29, 1993, at the time of the jury's question, Petitioner had been tried and convicted by another jury of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut. Pursuant to that jury's recommendation, the court had imposed a sentence of seventy-six years. (1/29/93 Tr. at 133.) Additionally, on January 29, 1993, Petitioner had been tried and convicted of two counts of

robbery and one count of the use of a firearm at a Domino's Pizza. That jury had recommended a sentence of eighteen years, but the court had not yet imposed the sentence.[12] (1/29/93 Tr. at 134.)

In its decision, the Virginia Supreme Court relied upon section 53.1-151(B1) of the Virginia Code, the statutory language establishing parole ineligibility in the event of three convictions for defined offenses. Section 53.1-151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (I) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (I), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The court found that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death," Petitioner had only two qualifying convictions – the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7-11 and murder of Kayani, the very offenses before the trial court for resolution. The court concluded that the Domino's Pizza

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[12] The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court. Moreover, on February 18, 1993, Petitioner also entered a plea and was convicted of the robbery of the Bragg Towers Hotel. The record does not indicate what disposition was made for the robbery of a cab driver.

conviction did not qualify under 53.1-151(B1) because even though the jury recommended that Petitioner serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the verdict) constitute a second predicate conviction? The Court finds no logical reason for the exclusion of the Domino's Pizza robbery conviction as a third conviction of Petitioner. From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

3. Unreasonable Application of Simmons

In the course of deliberating on Petitioner's punishment, the jury sent the following question into the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.) At the time of Petitioner's trial, Virginia law

precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (Va.1992).

The Commonwealth's immediate response to the jury's question was to advise the court of the language of the Model Jury Instruction 2.7000 which stated: "you are to decide what a just punishment is and not to concern yourself with what happens thereafter." (1/29/93 Tr. at 278.) In response thereto, Petitioner's counsel made the following statements:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court [sic] should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is – I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your

sentence will be the legal sentence imposed in the case."

I'm open to any other suggestions.

(1/29/93 Tr. at 278-79.)

The court responded by quoting the Virginia Model Jury Instruction and stating to defense counsel that "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that such an instruction had been given in the past, but further responded: "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/93 Tr. at 280.) The court sustained the Commonwealth's objection[13] and informed the jury that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences. The jury responded by recommending that Petitioner be sentenced to death. (*Id.* at 281.)

On direct appeal, Petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of capital murder, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution.

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[13] At this point, trial counsel was not obligated to offer or argue for a specific instruction contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir.1996).

The assignment of error was rejected on direct appeal. *Ramdass*, 450 S.E.2d at 361.

In a petition seeking a writ of certiorari from the United States Supreme Court, the issue was raised in the context of the court's refusal to inform the jury of Petitioner's parole status. That petition for certiorari was granted. On remand, the sole issue before the Virginia Supreme Court was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that Simmons was not an issue because Petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994). Writing for the court, Justice Whiting stated, in pertinent part:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered

as one felony offense under the express provisions of Code § 53.1-151(B1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the Simmons decision does not affect his death sentence.

Id. at 361.

Petitioner's case is not unlike the Simmons case. In both, the prosecution relied solely upon the "future dangerousness" prong of the statutory standard to establish the necessity of imposition of the death penalty. In both, the juries explicitly asked whether the defendant would be paroled if sentenced to life imprisonment. In both, the trial court gave obtuse answers that left the juries to speculate about the meaning of life imprisonment and the probability of the accused being released from incarceration. Under these parallel circumstances, the United States Supreme Court determined that evidence of parole

ineligibility is clearly relevant to rebut future dangerousness. Nevertheless, the Virginia Supreme Court determined that Simmons did not apply to Petitioner's case because, in the court's estimation, Petitioner was not parole ineligible. The Virginia Supreme Court made this determination, despite the obviously illogical factual basis upon which it was determined that Petitioner was parole eligible and despite the United States Supreme Court's admonition that juries should not be left to speculate about parole eligibility versus life imprisonment. This, the Court finds to be an unreasonable application of *Simmons*.

Moreover, by concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of Simmons. Even assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of

Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at 162, 114 S.Ct. 2187.

4. Conclusion

For the aforementioned reasons, the Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of Simmons as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is OVERRULED, and Petitioner's case is REMANDED to the Circuit Court of Fairfax County for resentencing.

B. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

Petitioner asserts numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a litigant must prove both: "(1) deficient performance and (2) prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, a litigant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed

the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. That is, a litigant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. To prove prejudice, the litigant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Failure to meet either prong defeats a litigant's ineffective assistance of counsel claim. *Id.* at 700, 104 S.Ct. 2052. A court need not address both components of the test if the litigant makes an insufficient showing on one part of the test. *Id.* at 697, 104 S.Ct. 2052.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

This claim consists of two parts: the procedurally defaulted claim of ineffectiveness for presentation of inconsistent defenses[14] and the preserved claim of ineffectiveness for failure to produce intent evidence. Only the latter will be addressed here. Petitioner's claim that his trial counsel was ineffective for failing to produce intent evidence is comprised of four (4) underlying claims: (i) Petitioner was unreasonably advised not to testify, thereby failing to confront the prosecution's argument that the gun was fired twice and in an upward

[14] If the claim were not procedurally defaulted, the claim is nonmeritorious. *See Brown v. Dixon*, 891 F.2d 490 (4th Cir.1989).

position; (ii) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner; (iii) trial counsel failed to cross examine the prosecution's firearms identification expert; and (iv) trial counsel failed to obtain an expert who would help them present their theory of the case. Characterizing these claims as "Monday-morning quarterbacking," the Magistrate Judge concluded that each of the claims was without merit.

With respect to the first and second sub-issues, Petitioner objects arguing that the Magistrate Judge failed to consider the affidavits of trial counsel wherein it was stated that these trial strategy choices were unreasonable and highly prejudicial. Even assuming Petitioner was prejudiced by not testifying, it is not deficient performance to advise one's client not to testify. *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir.1983). Therefore, the first prong is not satisfied because the performance did not fall below the objective standard of reasonableness.

With respect to the third sub-issue, Petitioner objects arguing that the firearms identification expert was never qualified as a "ballistics expert," yet he testified about ballistics matters, and, further, that trial counsel admits in his affidavit that he failed to interview the expert and erroneously allowed him to testify outside his qualifications, thereby substantially proving the prosecution's case. Upon review, the Court finds that the Magistrate Judge's reasoning on these issues is proper. (R & R 45-53.) Neither the Court's nor trial counsel's hindsight is a basis upon which to find that an unsuccessful trial tactic constitutes deficient performance. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir.1995).

With respect to the last sub-issue, Petitioner had two objections. First, he argued that it is improper to deny expert assistance yet rely on the absence of expert evidence to defeat a claim. And second, he contended that despite the Magistrate Judge's statement that testimony was undisputed on the issue of whether the gun was twice fired, Petitioner's own testimony in the penalty phase rebutted such evidence. The Court has already determined that the decision not to have Petitioner testify in the guilt phase regarding his intent was not deficient performance. The fact that Petitioner testified in the sentencing phase does not vitiate the undisputed nature of the evidence offered in the guilt phase that the trigger was pulled two times. Accordingly, Petitioner's objection is OVERRULED. This claim lacks merit.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

Citing Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (Va.1979), the Magistrate Judge determined that it was not ineffective assistance to permit co-defendant Singh to testify regarding his life sentence. (R & R 53-54.) Coppola held that a defendant is not entitled to offer evidence that an equally culpable co-defendant had received sentence of life instead of a death sentence. *Id.* Petitioner objects arguing that the Magistrate Judge's reliance on Coppola is erroneous because Singh was not the triggerman and, therefore, could not have been sentenced to the death penalty. Petitioner is correct that Singh was not eligible for the death penalty. Va.Code

§ 18.2-18. Nevertheless, whether such testimony prejudiced the jury is highly speculative. Without a modicum of proof, Petitioner claims that without the testimony there is a "reasonable probability that the jury would not have felt obligated to impose a harsher sentence" on Petitioner. Accordingly, Petitioner's objection is OVERRULED.

3. Trial counsel failed to conduct adequate voir dire.

With respect to Ross, Powell and Amelia, the Magistrate Judge concluded that trial counsel were not ineffective because (1) they challenged Ross and Powell but the trial judge overruled the challenges, (2) Powell was struck with a peremptory challenge, (3) Ross was the alternate and excused prior to deliberations and (4) Amelia was not selected to serve. (R & R 56.) Petitioner objects claiming that these jurors were legally unqualified to serve and, thus he was entitled either to have them stricken by the trial judge or to receive additional peremptory strikes. The Court finds that the trial judge was within his discretion to deny the challenges, *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), and that even if trial counsel had requested additional peremptory strikes (which they did not), there is no evidence that a biased jury was impaneled, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Accordingly, Petitioner's objection is OVERRULED.

With respect to Petitioner's claim that trial counsel failed to adequately voir dire all the jurors on whether they would consider mitigating factors, the Magistrate

Judge mentioned only that the Virginia Supreme Court had denied the claim on the merits. (R & R 56.) Petitioner objects claiming that the fact that some of the jurors indicated that they would not consider age or education to be mitigating factors raises a strong inference that other jurors also would not and, therefore, Petitioner is entitled to an evidentiary hearing in order to present such evidence. The Court finds that the claim is non-meritorious. The transcript reveals that many, if not all, of the jurors were asked if they could consider age and/or education as mitigating factors and, additionally, if they could follow the trial court's instructions regarding mitigating factors. (Tr. 1/26/93 111-13, 118-19, 134, 139, 142-43, 170-71, 185, 188, 193, 221-22, 238.) All indicated that they could follow the court's instructions, even if contrary to their personal opinions. For those few not asked the above questions, counsel made an unchallengeable tactical choice not to inquire. Accordingly, Petitioner's objection is OVERRULED.

4. Trial counsel conceded the sole aggravating factor in the penalty phase.

During sentencing, trial counsel stated in his opening that Petitioner was a bad man and might commit crimes in the future. Petitioner argues that these statements effectively conceded future dangerousness; therefore, trial counsel was ineffective. The Magistrate Judge determined that, pursuant to *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir.1990), the statements did not constitute ineffective assistance of counsel because they were consistent with maintaining credibility with the jury. Petitioner

objects arguing that *Clozza* holds that concessions are acceptable only in some cases and that this is not such a case because trial counsel conceded the very element the prosecution was required to prove beyond a reasonable doubt. The Court finds that trial counsel's statements do not constitute deficient performance. Trial counsel's theory was that no one could know whether Petitioner might commit crimes if he was on the street, but that Petitioner did not represent a future danger to society because he would spend the rest of his natural life in jail for the string of crimes for which he had been convicted. The allegedly improper statements are consistent with that theory and do not constitute deficient performance. Accordingly, Petitioner's objection is OVERRULED.

5. Trial counsel failed to adequately prepare for the penalty phase.

The Magistrate Judge determined that this claim consisted of two arguments: claims regarding the trial court's appointment of a mental health expert and other miscellaneous claims. For the reasons stated by the Magistrate Judge, (R & R 59-62.), the Court rejects the miscellaneous arguments regarding inadequate preparation. Trial counsel presented evidence of Petitioner's dysfunctional childhood through testimony by Petitioner, Petitioner's brother and mother and a probation officer who had worked with Petitioner. Although reasonable counsel may have chosen to present such evidence in a different manner, trial counsel's choice does not constitute deficient performance.

With respect to the mental health expert, Petitioner objects to the Magistrate Judge's conclusion, arguing that trial counsel was ineffective for not researching the appointed mental-health expert's background, thereby learning of his allegedly pro-prosecution bias, and for not objecting to the trial court's selection. Even assuming that counsel was deficient in not objecting to the court-appointed expert, the Court finds that Petitioner was not prejudiced. Under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), an indigent defendant is entitled to the appointment of a mental health expert when his legal sanity is likely to be a significant issue at trial. Va.Code. § 19.2-264.3:1 provides in pertinent part:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

The court-appointed expert neither found that Petitioner's sanity was at issue nor determined that Petitioner's history or character was a mitigating factor. Evidence regarding Petitioner's history and character, however, was presented through Petitioner, his mother and brother, and a probation officer. Further, Petitioner's repeated involvement in the criminal justice system had resulted in several mental evaluations which were consistent with each other. Evidence of these evaluations was presented through the probation officer. Finally, at no time has a mental evaluation of Petitioner revealed evidence that Petitioner was (or is) operating under a mental disease or defect which would render him unaccountable for his behavior. Accordingly, the Court finds that Petitioner was not prejudiced by any failure to object to the court-appointed expert or obtain an independent mental health evaluation. Accordingly, Petitioner's objection is OVERRULED.

C. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that the trial court was within its discretion in denying the requests for a medical doctor and expert investigator. (R & R 63.) Petitioner objects to the finding as to the medical expert. Petitioner argues that the trial court's denial of a medical expert on the grounds that "no medical evidence had been presented was an exercise in pretzel logic." The

Court finds that the trial judge's decision was not unreasonable in light of the lack of evidence Petitioner presented to justify his need for medical evaluation. Accordingly, Petitioner's objection is OVERRULED.

D. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

The Magistrate Judge determined that this claim was without merit because there was no constitutional entitlement to ex parte hearings on requests for the appointment of experts, and, if there is, such right would constitute a new rule that was not in place at the time of Petitioner's trial. (R & R 68.) Petitioner objects arguing that the requirement of an ex parte proceeding is firmly established by both the Supreme Court and the lower courts.

Under federal criminal procedure, when a defendant requests expert assistance, there is clearly a statutory right to an ex parte hearing. 18 U.S.C. § 3006A(e)(1). The appropriateness of conducting ex parte hearings is obvious: a defendant should not be forced to disclose its evidence and strategy to the prosecution. In *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, the United States Supreme Court recognized the need for an ex parte hearing, but did not hold that such a hearing is constitutionally required. Consequently, the adoption of such a rule at this point in Petitioner's case would be a new rule which, generally, should not be created on collateral review. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257,

108 L.Ed.2d 415 (1990). Accordingly, the objection is OVERRULED.

E. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's determination of this claim. Accordingly, the Court adopts the Magistrate Judge's rationale, (R & R 70-73.), which is reiterated herein in pertinent part. For the following reasons, the Court finds this claim to be non-meritorious.

Petitioner's claim has three components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made to the police by Petitioner's co-defendants and other prospective witnesses, including inculpatory and inconsistent statements made by co-defendants. The third is the trial court's refusal to conduct an in camera review. With respect to the first claim, polygraph material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159, 167 (1986). Moreover, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the Brady rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

With respect to the second claim, in order for a Brady violation to occur, the material sought must be "material." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is "material" under Brady "only where there exists a 'reasonable probability' " that had the evidence been disclosed the result at trial would have been different. *Wood*, 516 U.S. at 5, 116 S.Ct. 7. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), *quoting United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Here, counsel has not demonstrated that the withheld material undermines the confidence in the outcome of this trial.[15]

With respect to the third claim, the trial court did not commit error by refusing to examine the prosecution's file in camera to determine the presence of exculpatory material. In *Rowe v. Grizzard*, 591 F.Supp. 389 (E.D.Va.1984), similar to this case, defense counsel asked for "statements made by co-defendants and witnesses which either contradicted others' statements and/or were internally inconsistent." *Id.* at 398. The trial court refused, noting the prosecution's burden to comply with Brady. *Id.*

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[15] Moreover, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 n. 4 (4th Cir.1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir.1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir.1990). Petitioner has not asserted that he had no other means of obtaining the material which was withheld.

In denying the federal habeas petition, the district court stated: "Absent a more specific request than was made, the trial court is not required to make an in camera inspection of the prosecution's entire file." *Id.*

F. The Virginia death penalty statutes on their face, and as applied, violate the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77-85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious. The Fourth Circuit has denied claims similar to Plaintiff's preserved claims regarding jury consideration of mitigation evidence and consideration of unadjudicated misconduct. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995). Accordingly, Petitioner's objection is OVERRULED.

G. Petitioner was denied his right to confrontation in violation of the sixth amendment.

Petitioner claims that he was denied the right of confrontation in the course of cross-examining co-defendant Ramirez because the trial court sustained prosecution objections to defense questions concerning Ramirez' character and the location of fingerprints at the crime scene. The Magistrate Judge determined that the claim was nonmeritorious because only issues of state criminal procedure and evidence were challenged and such issues did not rise to a constitutional level. (R & R 85-86.)

Petitioner objects arguing that the wholesale sustaining of objections prevented adequate cross examination on Ramirez' character and propensity for criminal conduct, thereby affecting the jury's verdict(s) with respect to guilt and/or sentencing.

No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. The judgment of the trial court in denying certain questions it found to be prejudicial or irrelevant was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. As the United States Supreme Court noted in *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Accordingly, Petitioner's objection is OVERRULED.

H. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that Virginia law permits the use of unadjudicated criminal conduct in the sentencing phase. (R & R 86.) *Citing Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), Petitioner objects arguing that the federal constitution requires that the prosecution prove by a preponderance of the evidence that the defendant committed the unadjudicated conduct. In *Nichols*, the Supreme Court held that the federal due process clause requires in a non-capital, federal action that previous conduct being used

to enhance a sentence be proved by a preponderance of the evidence. *Id.* 114 S.Ct. at 1928.

The Court finds that Petitioner's argument, if accepted, would create a new rule which was not in effect at the time his conviction became final. *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257. The United States Supreme Court has repeatedly refused to determine the issue of whether unadjudicated criminal conduct can be introduced in the sentencing phase of a capital trial.[16] At the time of Petitioner's trial, Virginia statutory law permitted the introduction of such evidence when certain notice requirements are met. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (Va.1985); *see also Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995). Virginia law, however, did not require that the prosecution prove the conduct by any standard. *See Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (Va.1987). Because federal courts generally do not create new rules or apply new constitutional rights on collateral review, *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257, Petitioner's claim must fail. Accordingly, Petitioner's objection is OVERRULED.

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[16] In *United States v. Beckford*, 964 F.Supp. 993 (E.D.Va.1997), the court considered the issue of whether unadjudicated criminal conduct is admissible in a federal capital case. It indicated that the states are divided over the issue. As of 1993, six (6) states permit the use of such evidence almost without limitation; ten states require certain procedural safeguards; and eight states absolutely prohibit the introduction of such evidence. *See* Steven Paul Smith, Note, Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials, 93 Colum.L.Rev. 1249, 1250 (1993).

I. Virginia's capital murder sentencing statute is unconstitutional.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77-85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious as the statute is not unconstitutionally vague. The Fourth Circuit has denied Plaintiff's preserved claims that the "future dangerousness" prong of the Virginia capital sentencing statute is unconstitutional on that ground. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995) (finding that "future dangerousness" may be determined using unadjudicated misconduct); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995) (stating that Virginia is a "non-weighing" state, *i.e.* its statutory scheme narrows the class of persons eligible for death penalty and a weighing instruction is not required by the federal Constitution); *Spencer v. Murray*, 5 F.3d 758 (4th Cir.1993) (finding that "future dangerousness" prong is not vague). Accordingly, Petitioner's objection is OVERRULED.

V. REQUEST FOR EVIDENTIARY HEARING

Whether an evidentiary hearing is required is determined in light of the petition, the answer, the transcript and record of state court proceedings, and any expanded record evidence. *See* Rule 8, Rules Governing § 2254 Cases. If a hearing is not required, "the judge shall make such disposition of the petition as justice shall require." The Court finds that the facts presented in the record, transcripts of the state court proceedings, the affidavits of

trial counsel and experts, and the arguments presented in the pleadings lead to the conclusion that an evidentiary hearing is not required to address the claims raised by Petitioner. Accordingly, the request for an evidentiary hearing is denied.

VI. CONCLUSION

The Court, having examined the objections to the Magistrate Judge's R & R, and having reviewed the record and conducted a de novo review of those portions objected to, does hereby order that the petition be GRANTED and that Respondent's motion to dismiss be DENIED. Petitioner's case is REMANDED to the Circuit Court of Fairfax County for re-sentencing in light of the Court's rulings herein.

It is so ORDERED.

Bobby Lee RAMDASS, Petitioner-Appellee,

v.

Ronald J. ANGELONE, Director, Virginia Department of Corrections, Respondent-Appellant.

Bobby Lee Ramdass, Petitioner-Appellant,

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, Respondent-Appellee.

Nos. 98-30, 98-32.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1999.

Decided Aug. 3, 1999.

ARGUED: Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. F. Nash Bilisoly, IV, Vandeventer Black, L.L.P., Norfolk, Virginia, for Appellee. ON BRIEF: Mark J. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. John M. Ryan, Vandeventer Black, L.L.P., Norfolk, Virginia; Michele J. Brace, Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellee.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Murnaghan wrote an opinion concurring in part and dissenting in part.

OPINION

NIEMEYER, Circuit Judge:

A Fairfax County, Virginia court convicted Bobby Lee Ramdass of capital murder and sentenced him to death for the murder of Mohammed Kayani during the robbery of the convenience store where Kayani was a clerk. On Ramdass' petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254, the district court granted the writ and ordered the state court to resentence Ramdass, concluding that the state court had denied Ramdass due process by denying him the opportunity established by *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), to tell the jury during sentencing that he was ineligible for parole. The district court rejected the other grounds advanced by Ramdass in his petition.

Accepting the Virginia Supreme Court's state law determination that Ramdass was not, at the time of his sentencing proceedings, legally ineligible for parole, we conclude that *Simmons* was not applicable. Accordingly, we reverse the district court's order insofar as it concluded that *Simmons* required the writ to issue. Finding no error in the district court's disposition of the other issues, we affirm the remaining portion of the district court's order.

I

The facts of Kayani's murder are related by the Virginia Supreme Court as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and

> Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7-Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7-Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7-Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he

urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.

When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?"

After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."

Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass v. Commonwealth ("Ramdass I"), 246 Va. 413, 437 S.E.2d 566, 568-69 (1993) (footnote omitted). Following indictment and a trial, a Fairfax County jury found Ramdass guilty of capital murder in the commission of armed robbery as well as illegal use of a firearm. Ramdass had earlier pled guilty to one count of robbery.

At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society" – the "future dangerousness" predicate for imposition of the death penalty. *See* Va.Code Ann. § 19.2-264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."

During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to

be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern [them]selves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three-strikes provision.[1] *See*

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[1] Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is ineligible for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va.Code Ann. § 53.1-151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18-year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks after the jury in this case concluded its sentencing deliberations.

Va.Code Ann. § 53.1-151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

On direct appeal to the Virginia Supreme Court, Ramdass argued, inter alia, that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge prevented him from telling the jury that he was parole ineligible, a potentially mitigating factor. Rejecting that argument, the Virginia Supreme Court stated that Ramdass had advanced "no persuasive reason" to modify prior Virginia precedent holding that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass I*, 437 S.E.2d at 573 (citing *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379, 392 (1993)).

From that court's decision, Ramdass filed a petition for writ of certiorari with the United States Supreme Court. While that petition was pending, the United States Supreme Court decided *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), holding that when a prosecutor argues future dangerousness to a capital sentencing jury, a defendant who is parole ineligible has a due process right to respond to that argument by informing the jury, through argument or instruction, of his ineligibility for parole. After deciding *Simmons*, the Supreme Court granted Ramdass' petition for certiorari and remanded his case to the Virginia Supreme Court for

reconsideration in light of *Simmons*. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

On remand, Ramdass asserted that because he was ineligible for parole under Virginia's three-strikes statute, *Simmons* applied to his case and required that he be allowed to "meet the state's case against him" by informing the jury of his parole ineligibility. The Virginia Supreme Court, however, reaffirmed Ramdass' death sentence, concluding that the holding of *Simmons* was not implicated. Noting that *Simmons* applies "only if Ramdass was ineligible for parole when the jury was considering his sentence," the Virginia Supreme Court determined that Ramdass was "not ineligible for parole since he had only two separate felony offenses within the meaning of [the three-strikes provision]." *Ramdass v. Commonwealth ("Ramdass II")*, 248 Va. 518, 450 S.E.2d 360, 361 (1994) (internal quotation marks omitted). While recognizing the Pizza Hut conviction and the Kayani murder conviction as predicate offenses under the three-strikes statute, the court rejected Ramdass' argument that the January 7, 1993 jury verdict of guilty in the Domino's Pizza robbery was also a predicate conviction because "[j]udgment had not been entered on that verdict." *Id.* Accordingly, the court stated, "it cannot be considered as a conviction" under the three-strikes provision. *Id.* (citing *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707, 709 (1922)).

Pursuing state post-conviction relief, Ramdass again asserted in his state habeas petition that *Simmons* required that the jury be accurately informed as to his parole eligibility status, although he did not specifically challenge the Virginia Supreme Court's determination in *Ramdass II* that under Virginia law he was not ineligible

for parole. Ramdass also claimed that his trial counsel were constitutionally ineffective for, inter alia, failing to investigate and to object to the appointment of Dr. Stanton Samenow as his mental health expert because Dr. Samenow was "notoriously pro-prosecution" and refused to work with the defense. In arguing the ineffective assistance of counsel, Ramdass stated also that he was denied the reasonable assistance of a mental health expert at trial, in violation of both *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that in limited circumstances, a criminal defendant has a Fourteenth Amendment right to access to a competent psychiatrist) and Virginia Code § 19.2-264.3:1 (entitling indigent capital defendants to the assistance of a mental health expert). The Virginia Supreme Court dismissed the petition. It ruled that Ramdass' *Simmons* claim was barred from review under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) (holding that an issue previously decided against the petitioner on direct appeal may not again be considered on post-conviction review), and it summarily rejected Ramdass' ineffective assistance of counsel claim.

Seeking habeas relief in the federal courts, Ramdass filed this petition in February 1997, alleging, among other things, unconstitutional error in the trial court's failure to allow the jury to consider his alleged parole ineligibility. He also claimed that trial counsel were constitutionally ineffective for failing to investigate the views and reputation of Dr. Samenow, for failing to object to his appointment, and for failing to seek alternative mental health testimony. Finally, he alleged that his Fourteenth Amendment right to the assistance of a mental health expert had

been violated, either under *Ake* or by deprivation of a state-created right to such assistance provided in Va.Code Ann. § 19.2-264.3:1. The district court granted Ramdass a writ of habeas corpus based on the *Simmons* claim, dismissed the remaining claims, and ordered the state trial court to resentence him. *See Ramdass v. Angelone*, 28 F.Supp.2d 343, 356-74 (E.D.Va.1998). From the district court's order, the Commonwealth of Virginia appealed to challenge the *Simmons* ruling, and Ramdass cross-appealed to preserve his claim on various other grounds rejected by the district court.

II

In its appeal, the Commonwealth of Virginia raises two issues: (1) that the *Simmons* claim was defaulted because it was not properly raised in state court, and (2) that Ramdass is, in any case, not entitled to relief under *Simmons* because, had he been sentenced to life imprisonment, he would not have been parole ineligible under Virginia law.

The Commonwealth's first point – that Ramdass failed to preserve his *Simmons* claim by raising it in state court as required by 28 U.S.C. § 2254(b) (barring federal courts from entertaining habeas petitions from individuals who have not exhausted their state court remedies) – does not merit an extended discussion. Prior to filing his federal habeas petition, Ramdass raised his core *Simmons* claim – that due process entitled him to inform the jury that he was ineligible for parole – to the Virginia Supreme Court on at least three separate occasions: in his first direct appeal, in his direct appeal on remand from the

United States Supreme Court, and in his state habeas petition. Indeed, the most compelling evidence that Ramdass did not default his *Simmons* claim is the fact that the Virginia Supreme Court disposed of that claim by declaring it barred from review on state habeas by the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), which proscribes the relitigation of claims that have already been adjudicated on the merits in state court on direct appeal.

While it is true, as the Commonwealth points out, that Ramdass did not specifically contest the parole eligibility determination in his state habeas petition, he did assert the broader, more basic claim, which he had made all along, that the trial court's refusal to give the jury that information on his request violated his constitutional right to due process. We believe that the Commonwealth's characterization of Ramdass' *Simmons* claim for this purpose is unduly narrow. Accordingly, we conclude that the district court did not err in finding that the Simmons claim was not defaulted. We now turn to the merits.[2]

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[2] The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing the applicable standard of review, provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

A

Understanding first the precise rule in *Simmons* will aid our analysis of Ramdass' claims. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the prosecutor had argued to the jury during the penalty phase of trial that the death sentence was appropriate because Simmons, who had assaulted and killed several elderly women, was a future danger to society. To rebut this argument, Simmons contended that because he was only a threat to elderly women, none of whom he would ever encounter in prison, he did not pose such a danger. He proffered evidence that he was legally ineligible for parole and requested an instruction to the jury that if sentenced to life imprisonment, he would remain imprisoned "for the balance of his natural life." *Id.* at 160, 114 S.Ct. 2187. The trial court denied Simmons' request to inform the jury, either by argument or instruction, of his ineligibility for parole under South Carolina law. The United States Supreme Court ruled that this denied Simmons due process as guaranteed by the Fourteenth Amendment. *Id.* at 156, 171, 114 S.Ct. 2187 (Blackmun, J., plurality opinion); *id.* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring). We recognize Justice O'Connor's concurrence as the controlling opinion in *Simmons* because it represents the narrowest grounds upon which a majority

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established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

of the Court agreed. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995); *see also O'Dell v. Netherland*, 521 U.S. 151, 158, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

Writing for the plurality, Justice Blackmun held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187. When the jury lacks such information, the plurality noted, there is a real danger that the state will "succeed[ ] in securing a death sentence on the ground, at least in part, of . . . future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.* at 162, 114 S.Ct. 2187.

In her concurrence, Justice O'Connor recognized that when a state prosecutor argues future dangerousness to the jury, the defendant's only opportunity to rebut that argument will often be by telling the jury that "he will never be released from prison." *Id.* at 177, 114 S.Ct. 2187. Justice O'Connor went on to conclude that

> in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree

> that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id.

Accordingly, the grounds on which both the plurality and Justice O'Connor agree are summarized in *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir.1995):

> *Simmons* does not hold, as the plurality opinion at one point put it, that "due process requires that the sentencing jury be informed that the defendant is parole ineligible," *id.* at [156, 114 S.Ct. 2187] (plurality opinion). It only holds more narrowly that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible." *Id.* at [177, 114 S.Ct. 2187] (O'Connor, J.). . . . Put in terms familiar from philosophical and jurisprudential debates over the proper meaning of "equality" and "equal protection," the defendant's right, under *Simmons*, is one of opportunity, not of result.

In short, a defendant in a capital case is constitutionally entitled, under *Simmons*, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and

(2) the only available alternative sentence to death is life imprisonment without the possibility of parole.

It is undisputed in this case that Ramdass meets the first requirement. The prosecutor at Ramdass' sentencing proceeding argued that the death penalty was necessary solely because Ramdass was a future danger to society. Whether Ramdass meets the second requirement is the principal source of dispute in the appeal before us.[3] Resolution of this issue depends on how *Simmons* defines parole ineligibility and whether, under the standards for making that determination, Ramdass was ineligible for parole at the time of the penalty phase of trial.

B

In *Ramdass II*, the Virginia Supreme Court held that *Simmons* did not apply to Ramdass' case because *Simmons* required legal ineligibility for parole and Ramdass was not ineligible for parole under Virginia law. The Court concluded that if sentenced to life imprisonment on the

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[3] It is undisputed that the Supreme Court decided *Simmons* before Ramdass' direct appeal was final. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994) (granting Ramdass' petition for certiorari on direct appeal and remanding to the Virginia Supreme Court for reconsideration in light of *Simmons*); *cf. O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (declaring that *Simmons* announced a "new rule" under *Teague* for all already final convictions). Accordingly, the anti-retroactivity component of § 2254(d) would not bar application of *Simmons* to Ramdass' habeas petition on retroactivity grounds if *Simmons* is otherwise applicable as a matter of substantive law.

Kayani murder, Ramdass would not have been "convicted of three separate felony offenses" of murder, rape, or armed robbery as required for parole ineligibility under Virginia's three-strikes statute. Va.Code Ann. § 53.1-151(B1). According to the court, Ramdass' qualifying convictions at the time were (1) the Pizza Hut armed robbery conviction, upon which judgment had been entered, and (2) the Kayani murder conviction. The court acknowledged that a jury had also returned a verdict finding Ramdass guilty of armed robbery in the Domino's Pizza incident. But, relying on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922), which held that conviction does not occur until judgment is entered, the court concluded that the Domino's Pizza robbery could not be counted as the third strike under the Virginia statute because the court had not entered judgment on that guilty verdict at the time that the jury in this case was deliberating Ramdass' sentence. *See Ramdass II*, 450 S.E.2d at 361.

Ramdass contends that the Virginia Supreme Court misconstrued *Simmons* as requiring a state law determination of parole ineligibility rather than "the functional and common-sense [im]possibility of parole" as the trigger for the right to inform the jury of parole ineligibility. Moreover, even if state law governs the parole ineligibility determination for purposes of applying *Simmons*, Ramdass, in substance, accuses the Virginia Supreme Court of attempting to avoid the application of Simmons by adopting a novel and highly technical definition of "convicted" in the three-strikes provision. Further, Ramdass maintains that even if a conviction requires the entry of judgment, as *Ramdass II* held, the Domino's Pizza guilty

verdict should count as a conviction because the entry of judgment was nondiscretionary, purely ministerial, and legally insignificant. In short, Ramdass argues for a pragmatic, functional, nonlegalistic concept of when a defendant is ineligible for parole.

Because Ramdass advances an erroneous interpretation of *Simmons*, we must begin by turning to *Simmons* itself. *Simmons* grants capital defendants a due process right in state trials to advise a jury of parole ineligibility only when the only alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole. That condition cannot be a general question of practicality determined by a federal habeas court, as Ramdass argues. Parole eligibility is a state law question. Under *Simmons*, only those capital defendants who are parole ineligible under state law at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment. In other words, a trial court must determine the question of whether *Simmons* applies to a particular defendant based on whether state law renders that defendant ineligible for parole. *See Simmons*, 512 U.S. at 156, 114 S.Ct. 2187 (Blackmun, J., plurality opinion) (limiting the holding to situations where "state law prohibits the defendant's release on parole"); *id.* at 176, 114 S.Ct. 2187 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that for Simmons "the only available alternative sentence to death . . . was life imprisonment without the possibility of parole").

When Ramdass argues that *Simmons'* applicability is not conditioned on "a state's determination of 'parole ineligibility' at the moment of capital sentencing" but

rather on a nonlegalistic "common-sense [im]possibility of parole," he advances a new interpretation of *Simmons* that is simply incompatible with the logic of *Simmons* itself. In relying on Justice O'Connor's statement that *Simmons* applies in "cases in which the only available alternative sentence to death . . . is life imprisonment without possibility of parole," *id.* at 177, 114 S.Ct. 2187, to argue that a federal, functional standard applies to parole ineligibility determinations, Ramdass ignores the *Simmons* plurality's repeated reference to state law as the determining factor for whether or not a defendant is ineligible for parole. *See, e.g., id.* at 156, 114 S.Ct. 2187 ("We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible" (emphasis added)); *id.* at 165, 114 S.Ct. 2187 (observing that the defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was legally ineligible for parole" (emphasis added)); *id.* at 165 n. 5, 114 S.Ct. 2187 ("The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law" (emphasis added)). Moreover, his reliance on Justice O'Connor's language is also misplaced. Ramdass' interpretation not only reads too much into Justice O'Connor's phraseology, but it also takes the phrase out of context. Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality and believed that the parole eligibility determination was

governed by anything other than state law. On the contrary, she cited state law to show that Simmons himself was ineligible for parole, *see id.* at 176, 114 S.Ct. 2187, and she concluded that Simmons was entitled to communicate his parole ineligibility to the jury because "the only alternative sentence to death under state law was life imprisonment without possibility of parole," *id.* at 178, 114 S.Ct. 2187 (emphasis added). *See also id.* at 176, 114 S.Ct. 2187 ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact").

In addition, Ramdass' argument for equating legal parole ineligibility with a common-sense impossibility of parole is at odds with case law from this circuit. Under Ramdass' theory, defendants who are, as a practical matter, unlikely to be paroled – perhaps because a state only rarely grants parole or because the defendant would be over a hundred years old when finally legally eligible – would be entitled to a *Simmons* instruction. Yet, we have consistently refused to apply *Simmons* to cases in which the defendants were not legally ineligible for parole at the time of sentencing. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999) (refusing to extend *Simmons* to apply to a defendant who would not become eligible for parole for twenty-five years, under state law); *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998) (holding that "[s]ince Keel would have been eligible for parole had he not been sentenced to death, [citing state law], he is not entitled to any relief under our current interpretation of *Simmons*"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.) (declining to apply *Simmons* after Virginia

Supreme Court determined defendant was not ineligible for parole under the three strikes statute because his convictions arose out of the same transaction), *cert. denied*, ___ U.S. ___, 119 S.Ct. 389, 142 L.Ed.2d 321 (1998).

Finally, as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1). *Cf. Keel*, 162 F.3d at 269. This statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal habeas law." *Green v. French*, 143 F.3d 865, 873 (4th Cir.1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n. 9 (4th Cir.1999); *see also Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir.1999) (noting

that § 2254(d)(1) "closes the escape hatches in *Teague*").[4] Thus, either under Teague or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail.

C

Having determined that *Simmons* applies only to a capital defendant who, under state law, is legally ineligible for parole at the time of sentencing, we turn to the question of whether Ramdass meets this threshold requirement. The Virginia Supreme Court held that, under the three-strikes statute, he did not. *See Ramdass II*, 450 S.E.2d at 361. The district court held that the state court's conclusion was an unreasonable determination of fact. *See Ramdass v. Angelone*, 28 F.Supp.2d at 365.

As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. *See Fitzgerald*, 150 F.3d at 367 (citing *Fitzgerald v. Commonwealth*, 249 Va. 299, 455 S.E.2d 506, 510 (1995)). Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

More significantly, parole eligibility is a question of state law and therefore is not cognizable on federal

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[4] In fact, § 2254(d)(1) can be seen as stricter in that it does not recognize *Teague*'s two traditional exceptions which permit retroactive application of new rules which either "place[ ] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or are "watershed rules of criminal procedure." *See Green*, 143 F.3d at 873 (quoting *Teague*, 489 U.S. at 311-12, 109 S.Ct. 1060).

habeas review. The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

Even if we were not so constrained, however, we would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim. At most, Ramdass can complain about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge – the Kayani murder – first, in which case he would have had only one qualifying conviction at the

time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

Second, Ramdass characterizes the Virginia Supreme Court's reliance on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922) (discussing the meaning of the term "conviction" in the context of a statute removing public officials from office upon conviction of crimes of moral turpitude), as a judicial version of grasping at straws. Yet, sound reasoning supports *Smith's* holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith's* factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment – even if it appears to be only a formal step of the process – in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural protection against unfairness or corruption.

Third, Ramdass attempts to portray the *Smith* decision as an irrelevant relic. While the Virginia Supreme Court had not cited this case in a published opinion since the 1920s, the intermediate appellate court has observed that "Virginia courts have defined the word 'convicted' in accordance with *Smith*, but only in the context of a defendant who has been confronted with some type of forfeiture." *Fields v. Commonwealth*, 5 Va.App. 229, 361 S.E.2d 359, 362 (1987) (purporting to limit Smith to its facts). As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the Smith definition of conviction is appropriate, or even necessary. Upon

amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury. Finally, the fact that the Virginia Supreme Court has remanded for re-sentencing upon finding a *Simmons* violation in another case defeats the implication that the Virginia Supreme Court is somehow hostile to enforcing the *Simmons* right. *See Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

We have included this discussion only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim. In the end, however, we reiterate that this dispute about the meaning of the Virginia three-strikes statute is wholly a question of state law that cannot provide the basis for a federal court to grant the writ of habeas corpus. *See* 28 U.S.C. § 2254(a).

III

On his cross-appeal, Ramdass contends that the district court erred in dismissing, either as defaulted or meritless, the following four other claims in support of his habeas petition: (1) the Virginia Supreme Court's determination that he was eligible for parole as of the time of sentencing under Virginia law was so arbitrary as to violate due process; (2) the denial of access to assistance from a mental health expert violated his right to due process; (3) the ineffective assistance of counsel

denied him the constitutional right to counsel; and (4) the denial of funds for expert assistance and an evidentiary hearing violated his right to due process. We address these claims in order.

A

First, Ramdass claims that the Virginia Supreme Court's interpretation of the three-strikes provision was so inconsistent with Virginia precedent and so arbitrary that it violated due process. In response to the Commonwealth's contention that this claim was defaulted by failure to raise it in state court, he argues that it could not have been defaulted because the Virginia Supreme Court in fact addressed it simply by concluding that he was parole eligible under Virginia law. This argument, however, proves too much. Carried to its logical conclusion, Ramdass' argument would mean that every judicial ruling carries with it an implicit, due process rubber-stamp. There is no evidence that the Virginia Supreme Court's parole eligibility determination silently encompassed an additional conclusion that the parole eligibility finding itself comported with due process. Because, as Ramdass concedes, ineffective assistance of state habeas counsel will not show cause for his default, *see Mackall v. Angelone*, 131 F.3d 442, 446-49 (4th Cir.1997), we have no power to reach the merits of this independent due process claim on federal habeas. *See* 28 U.S.C. § 2254(b)(1)(A). In any event, we would reject the claim on the merits for the reasons given in our discussion in Part II(C), above.

B

Ramdass next challenges the district court's rejection of his claims that he was illegally denied the assistance of a mental health expert based on two, separate theories: (1) the due process right to access to a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (2) the due process right to non-arbitrary enforcement of Virginia Code § 19.2-264.3:1, which grants capital defendants the assistance of a mental health expert. Although the district court did not distinguish between these two arguments, holding that they were defaulted, we conclude (1) that the *Ake* claim was preserved but that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing it, and (2) that the claim based on the arbitrary enforcement of state law was defaulted.

The standard for state court exhaustion prior to filing a federal habeas petition is not, as the Commonwealth suggests, whether a petitioner presented the "identical" claim in state court but rather whether he "fairly presented" his federal claim to the state court. "A claim is fairly presented when the petitioner presented to the state courts the substance of his federal habeas corpus claim. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (emphasis added and internal quotation marks and citations omitted).

Under this standard, Ramdass did include in his state habeas petition at least the "substance" of his federal

claim that he was denied a mental health expert in violation of due process under *Ake*. Even though the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on the seminal Supreme Court case, *Ake*. He summarized the holding of *Ake* and alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. Even so, the Virginia Supreme Court dismissed this claim, finding that it had no merit. In doing so, the Virginia Supreme Court did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d).

Ake provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82-83, 105 S.Ct. 1087 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when the State presents psychiatric evidence of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

The due process claim for the arbitrary enforcement of a state statute was defaulted because, in his state habeas petition, Ramdass stated only that his rights under the state statute had been denied. This is no more

than a state law question. Ramdass did not make the further argument, necessary to make the claim cognizable on federal habeas review, that this denial constituted a violation of his right to due process under the Fourteenth Amendment. *See* 28 U.S.C. § 2254(a).

C

In support of his ineffective assistance of counsel claim, Ramdass argues that his trial counsel were deficient in failing to object to Dr. Samenow's appointment and in failing to seek assistance from an alternative mental health expert once they realized that Dr. Samenow would not be helpful. We conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing this claim for lack of merit. *See* 28 U.S.C. § 2254(d).

To prevail on his ineffective assistance of counsel claim, Ramdass must meet two well-established requirements. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is a difficult showing to make because in assessing the reasonableness of counsel's course of action, "[o]ur review . . . is highly deferential" to counsel. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.1998) (*citing Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court, assuming arguendo that Ramdass could satisfy the deficiency

prong of Strickland, ruled that Ramdass's ineffective assistance claim failed because he could show no prejudice. *See Ramdass*, 28 F.Supp.2d at 370. We agree.

Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither *Ake*, 470 U.S. at 83, 105 S.Ct. 1087, nor Virginia Code § 19.2-264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by Strickland, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

D

On Ramdass' final point, we conclude that, because Ramdass failed to make out a prima facie case as to his mental health expert and ineffective assistance claims, the district court did not err in denying Ramdass funds for expert assistance or an evidentiary hearing.

IV

In sum, we reverse the district court's decision to grant Bobby Lee Ramdass' petition for a writ of habeas corpus based upon a *Simmons* violation. Because *Simmons* is limited to situations where state law renders the defendant legally, not merely practically, ineligible for parole, we conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law when it ruled that *Simmons* did not apply to Ramdass' case because Ramdass was not ineligible for parole under Virginia law. In addition, we affirm the district court's opinion as to the remaining issues raised by Ramdass on cross-appeal. The judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's handling of most of the issues raised by Ramdass.[1] I respectfully dissent, however, from the majority's treatment of Ramdass' Simmons

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[1] I note that I concur only in the judgment on the *Ake* claim. *Ake* provides that under certain circumstances "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Ramdass presented ample evidence to show that Dr. Stanton Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination. Dr. Samenow has publicly stated that criminals are a "different breed of person," (J.A. at 347), who seek to manipulate the system for their own ends. He has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that "[m]ost diagnoses of mental illness [in criminals] resulted from the criminal's fabrications." (J.A. at 348.) Dr. Samenow's published works state that circumstances have nothing to do with criminal violations and that "providing the criminal with an opportunity to present excuses deferred him and us further and further from change." (J.A. at 348.) According to a report submitted to the district court by Dr. Reuben Koller, Dr. Samenow's views obviate his ability to evaluate mitigating factors relating to the history or character of a criminal defendant "because he is of the opinion that no mitigating factors can exist." (J.A. at 474.) Even if Dr. Samenow were to abandon his public beliefs and identify mitigating factors, his testimony would be subject to damaging impeachment on cross-examination from his own publicly expressed views. In fact, the record shows that just that happened at another capital sentencing trial. Further, Dr. Koller opined that Dr. Samenow's examination of Ramdass was "incomplete, deficient and inadequate according to conventional psychological standards." (*Id.*) Dr. Koller's preliminary evaluation of the records available to Dr. Samenow indicated seven specific factors ignored by Dr. Samenow which could be considered significant factors in mitigation. It is also worth noting that Dr. Samenow has been at the center of at least two other constitutional challenges. *See Swann v. Taylor*, 173 F.3d 425, 1999 WL 92435, at *6-*9 (4th Cir.1999) (unpublished table disposition) (claiming *Ake* violation); *Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir.1998) (claiming ineffective assistance of counsel for using Dr. Samenow).

We have suggested that *Ake* requires only an expert and an examination, *see Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998), not a competent expert and an appropriate examination, *but see id.* at 409 (Michael, J., concurring) (noting that the *Wilson* majority did not squarely reject the right to an appropriate examination). I agree that *Ake* does not require "effective assistance of a psychiatric expert." *See, e.g., Pruett v.*

claim. Because it seems evident that Ramdass should be able to inform the jury, by argument or court instruction,

of his non-eligibility for parole if sentenced for life imprisonment, I would affirm the district court on the Simmons claim so that the sentencing jury could be accurately informed that Ramdass would be parole ineligible.

Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir.1993). In my view, though, the Supreme Court requires more than just a warm body with a prefix attached to his name; *Ake* provides a right to a "competent expert" and an "appropriate examination." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. (I note that competence and appropriateness, based on objective professional criteria, are entirely different than effectiveness).

Ultimately, however, Ramdass' *Ake* claim must fail. On direct appeal I would follow the Tenth Circuit and hold that *Ake* applies when the state presents any evidence on future dangerousness and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor. *See Castro v. Oklahoma*, 71 F.3d 1502, 1513 (10th Cir.1995); *Liles v. Saffle*, 945 F.2d 333, 340-41 (10th Cir.1991). *Compare Tuggle v. Netherland*, 79 F.3d 1386, 1387-88 (4th Cir.1996) (describing the *Ake* right as arising when the prosecution first presents psychiatric testimony), *with Swann*, 173 F.3d 425, 1999 WL 92435, at *2 (stating *Ake* applies "when a capital defendant's future dangerousness is to be a significant factor at the penalty phase of the trial"). Constrained by the Anti-Terrorism and Effective Death Penalty Act of 1996 amendments to 28 U.S.C.A. § 2254(d)(1) (West Supp.1999), however, I believe that *Ake's* application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court. *Cf. Rogers v. Gibson*, 173 F.3d 1278, 1285 n. 5 (10th Cir.1999) (stating that it is doubtful that applying Ake when state has not presented psychiatric evidence of future dangerousness is clearly established by the Supreme Court).

I.

A clear statement of the factual context of this case is useful to gain an understanding of the arbitrariness of the result reached by the majority.

The jury found Ramdass guilty of the Kayani murder on January 28, 1993. His sentencing hearing began the next day. At that hearing, the prosecution presented as evidence of Ramdass' future dangerousness the fact that he had been found guilty of the Pizza Hut robbery, *see infra*, and the Domino's Pizza robbery, *see infra*. The Commonwealth also emphasized that previously Ramdass had committed crimes while released on "mandatory" parole. While deliberating Ramdass' sentence, the jury asked the judge, "if the Defendant is given life is there a possibility of parole at some point before his natural death?" (emphasis added). Rather than answering that question, the judge told the jury that they were "not to concern [themselves] with what may happen" after they impose his sentence. On January 30, 1993, the jury imposed a sentence of death.

On appeal, the Supreme Court ordered the Virginia Supreme Court to reconsider Ramdass' case in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). *Simmons* involved facts almost identical to those at bar. In *Simmons*, a defendant was made parole ineligible by a conviction for capital murder. At the sentencing phase for that crime, the defendant requested that the jury be instructed that a life sentence would not carry with it the possibility of parole. To bolster his position, the defendant cited, inter alia, a

study indicating that more than 75 percent of those surveyed in South Carolina considered the amount of time a defendant would actually have to spend in prison to be an "extremely important" or "very important" factor in choosing between life and death. *Simmons*, 512 U.S. at 159, 114 S.Ct. 2187. As in the case at bar, during deliberations, the jury asked the judge a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160, 114 S.Ct. 2187. The trial judge gave a vague answer and instructed the jury not to consider parole in reaching its verdict. *Id.* Within minutes, the jury returned a sentence of death.

On remand in the case at bar, the Virginia Supreme Court held that *Simmons* was inapplicable because under Virginia law, Ramdass was not technically parole ineligible at the time the jury was deliberating his capital sentence. Under Virginia law, a felon is parole ineligible if he has been "convicted" of three offenses of murder, rape, or robbery with a deadly weapon (a "predicate conviction"); when multiple predicate convictions are part of a common act, transaction, or scheme, they are counted as only one predicate conviction. *See* Va.Code Ann. § 53.1-151(B1) (Michie 1998) (the "three strikes law").

At the time the capital jury was considering his sentence, Ramdass had been found guilty of five robberies and one murder.[2] One of the robberies involved no deadly weapon and therefore was not a predicate conviction. Two of the other robberies were part of the same

[2] He was also awaiting trial on two other armed robberies, both involving assault with a deadly weapon.

transaction. On December 15, 1992, a jury had found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Pizza Hut robbery"). Judgment and sentence for this crime was officially imposed on January 22, 1993. At the time that Ramdass was sentenced on the Kayani murder, this conviction was still subject to a motion to set aside the verdict for trial error or insufficiency of the evidence. *See* Va. Sup.Ct. R. 3A:15(b) (Michie 1998). It was also subject to an appeal. *See* Va.Code Ann. § 17-116.05:3 (Michie 1996). The Virginia Supreme Court counted the Pizza Hut robbery as only one predicate conviction.

The final two armed robberies were also part of one transaction. On January 7, 1993, in a separate proceeding, a jury found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Domino's Pizza robbery"). Judgment and sentence on this crime was not officially imposed until February 18, 1993. The Virginia Supreme Court reasoned that the Domino's Pizza robbery did not count as a predicate conviction because at the time of the Kayani sentencing, Ramdass had not yet been "convicted" of that offense under the meaning of that term in the three strikes law – although he had been found guilty, judgment had not yet been officially entered. With only one predicate conviction besides the Kayani murder, the Virginia Supreme Court held that *Simmons* was inapplicable because on January 30, 1993 Ramdass was technically eligible for parole.

While this result is sound under the legal technicalities of Virginia law, in practical reality it was a certainty that Ramdass would be parole ineligible upon

entry of the Kayani conviction. Indeed, at the Kayani sentencing, there was no practical difference between the Domino's Pizza robbery guilty verdict and the Pizza Hut robbery guilty verdict. From January 30, 1993 until February 18, 1993, no motions were outstanding which could have affected the Domino's Pizza conviction. Ramdass claims that as of January 30, 1993, his motion to strike the evidence as insufficient as a matter of law in the Domino's Pizza robbery case, *see* Va. Sup.Ct. R. 3A:15(a), had already been denied. So, except for the ministerial act of formally entering judgment, on January 30, 1993, Ramdass was in exactly the same position vis-a-vis the Domino's Pizza robbery as he was vis-a-vis the Pizza Hut robbery: the finding of guilt was subject only to a Rule 3A:15(b) motion to set aside the verdict and an appeal under Virginia Code § 17-116.05:3.[3] Thus, although it was a virtual certainty at his capital sentencing that Ramdass would be ineligible for parole, the Virginia Supreme Court found that Simmons was not applicable because Ramdass was still in some technical legal sense eligible for parole.

[3] The Commonwealth also points out that under Va.Code Ann. §§ 19.2-298 and 303 (Michie 1995), the court could suspend the imposition of the sentence or suspend the sentence in whole or in part. This is irrelevant, however, for two reasons. First, the Pizza Hut robbery was also subject to a § 19.2-303 suspension of the sentence. Second, regardless of whether a sentence has been suspended, nothing in §§ 19.2-298 or 19.2-303 erases the conviction for purposes of parole ineligibility under Virginia's three strikes statute.

Nineteen days after the jury delivered Ramdass' sentence for the Kayani murder, the ministerial act of entering judgment on the Domino's Pizza robbery was completed, giving Ramdass his second predicate conviction. The Kayani sentence and judgment was officially imposed on April 6, 1993 – more than one month after formal entry of judgments on the Pizza Hut robbery and the Domino's Pizza robbery. When judgment for the Kayani murder was entered, that judgment, combined with the Pizza Hut conviction and the Domino's Pizza conviction gave Ramdass his third strike, making him ineligible for parole. This was exactly the occurrence of which Ramdass had requested the jury be informed.

II.

The majority takes the view that the Virginia Supreme Court's interpretation of Virginia law settles the case. I disagree. There is no doubt that the Virginia Supreme Court was entitled to interpret the word "convicted" in Virginia Code § 53.1-151(A) in the way it did. Further, we are bound by this interpretation of state law by the highest state court. This case does not hinge on the word "convicted" in Virginia law, however. The case hinges upon the requirements of the Due Process clause of the Fourteenth Amendment. In Simmons, the Supreme Court defined one aspect of this Due Process clause. Admittedly, the right recognized in Simmons is dependent to some extent upon state law: The right depends upon state parole law; the right only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right, nonetheless, and the

scope and parameter of the *Simmons* right is a matter of federal constitutional law.

The majority rejects a "pragmatic, functional, non-legalistic concept" of the *Simmons* right. I think the majority has overlooked the genesis of *Simmons*. *Simmons* was merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), that "elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper*, 476 U.S. at 5 n. 1, 106 S.Ct. 1669 (plurality opinion) (*quoting Gardner*, 430 U.S. at 362, 97 S.Ct. 1197), quoted in part in *Simmons*, 512 U.S. at 164, 114 S.Ct. 2187 (plurality opinion), and *quoted in id.* at 175, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). As both the plurality opinion and the O'Connor concurrence[4] recognized, the fact that the defendant will never be released from prison "will often be the only way that a violent criminal can successfully rebut the State's case [of future dangerousness]." *Simmons*, 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment); *id.* at 163-64, 114 S.Ct. 2187 (plurality opinion) ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. . . .

[4] We have recognized Justice O'Connor's concurrence as the controlling opinion in *Simmons*. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995).

Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

This principle has full force in the case at bar. At capital sentencing, the prosecution presented evidence of Ramdass' future dangerousness. Some of this evidence included the fact that Ramdass had committed the Pizza Hut robbery and the Domino's Pizza robbery. More importantly, the Commonwealth repeatedly referred to the fact that Ramdass had committed many of his crimes while on parole. The Commonwealth mentioned the phrase "mandatory parole" several times, suggesting to the jury that the Commonwealth would have no choice but to parole Ramdass at some future date. In the face of this evidence of future dangerousness, Ramdass was rendered powerless to explain to the jury that, but for what was at that point a meaningless ministerial act, he was ineligible for parole under state law.[5] Thus, under *Gardner*, *Skipper*, and *Simmons*, *Ramdass* was denied his "elemental due process" right to deny or explain the

[5] The majority sets up a straw man by asserting that Ramdass has asked us to extend *Simmons* to situations in which a defendant is not ineligible for parole under state law. The majority relies in part on *Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999), *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), and *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.1998), to defeat this straw man. In each of those cases, however, the defendant remained eligible for parole under state law even when all ministerial acts were completed. Of course *Simmons* did not apply to each of those defendants. Those cases are wholly inapposite here, where Ramdass' whole argument is based on his parole ineligibility under state law.

Commonwealth's evidence of future dangerousness. *See Simmons*, 512 U.S. at 175 (O'Connor, J., concurring).

It is also important to remember the audience of the *Simmons* right. *Simmons* is concerned about the defendant's ability to present rebuttal evidence to a jury. Thus, *Simmons* is grounded in the right to present information which might affect a jury's decision making. Juries are not concerned about legal technicalities or remote and theoretical possibilities. They are concerned about practical realities. The Supreme Court recognized this point in *Simmons*. In *Simmons*, South Carolina argued that informing the jury that the defendant would be parole ineligible was inherently misleading because future contingencies such as legislative reform, commutation, and clemency might allow the release of the prisoner. The plurality rejected this argument, holding that the defendant could not be denied the right to rebut prosecution evidence of future dangerousness merely because of "hypothetical future developments." *Simmons*, 512 U.S. at 166, 114 S.Ct. 2187. The court reasoned that a parole ineligibility instruction was more accurate than no instruction at all, which would inevitably leave the jury to assume that the defendant would eventually be released. *Id.* Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality that remote contingencies were irrelevant to the due process analysis.

In the case at bar, the majority hides its reliance on hypothetical future developments behind a state law shield. Because Ramdass did not become technically "parole ineligible" under Virginia law until judgment was formally entered on the Domino's Pizza robbery, the majority holds that Simmons is inapplicable. But at the

time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. The reason the Supreme Court rejected reliance on such future hypothetical developments is evident in the arbitrary result of the case at bar. At the time of the Kayani sentencing, the court had already rejected Ramdass' motions in the Domino's Pizza robbery case to set aside the jury's verdict before entry of judgment. *See* Virginia Sup.Ct. R. 3A:15(a). Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible when the Kayani conviction was formally entered.

Further, there was at the time of the Kayani sentencing no practical basis for distinguishing between the Pizza Hut robbery guilty verdict and the Domino's Pizza robbery guilty verdict. Because the Rule 3A:15(a) motions had been denied for the Domino's Pizza robbery verdict, both verdicts were subject to an identical degree of uncertainty – either could be set aside only under a Rule 3A:15(b) motion or on appeal. Yet the majority asserts that the constitution requires us to treat the one as a certainty and the other as if it did not exist.

Splitting hairs when a man's life is at stake is not becoming to a judiciary or a legal system. I do not believe that due process requires or allows such arbitrary results. I would hold that, regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Radars [sic] had a constitutional due process right

to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOs. 98-30 (L) & 98-32

BOBBY LEE RAMDASS

Petitioner-Appellee,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellant.

PETITION FOR PANEL REHEARING
and PETITION FOR REHEARING EN BANC

F. Nash Bilisoly
John M. Ryan
VANDEVENTER BLACK L.L.P.
500 World Trade Center
Norfolk, Virginia 23510
(757) 446-8600

Michele J. Brace
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, VA 23219
(804) 643-8439

Counsel for Bobby Lee Ramdass

* * *

STATEMENT OF PURPOSE

Pursuant to Fed. R. App. P. 40 and 35, Petitioner-Appellee Bobby Lee Ramdass, by counsel, petitions for

rehearing and for rehearing *en banc* of the panel *majority's* decision to reverse the district court and to deny Mr. Ramdass habeas corpus relief. In the judgment of counsel, the following situations exist: (1) the majority panel decision conflicts with the decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and the conflict is not addressed in the majority opinion; (2) the proceeding involves questions of exceptional importance involving the Constitutional right of a capital defendant to rebut evidence of future dangerousness; and (3) the majority panel decision overlooked a material fact and legal matter, i.e., that Ramdass was *in fact* ineligible for parole on the date of his sentencing.

INTRODUCTION

At the time of Ramdass' trial, Virginia law provided that a prisoner was ineligible for parole if he had three unrelated convictions ("three strikes") for armed robbery, rape, or murder. Code of Virginia § 53.1-151(B1).

Ramdass' first "strike" was the armed robbery of a Pizza Hut in Fairfax. The jury found him guilty and fixed his sentence at 76 years in prison on December 15, 1992. The trial court entered judgment on January 22, 1993.

Ramdass' second "strike" was the armed robbery of a Domino's Pizza in Arlington. The jury found him guilty and fixed his sentence at 18 years in prison on January 7, 1993. Ramdass moved to strike the evidence as insufficient immediately after the jury rendered its verdict, and the court denied that motion. Entry of judgment was scheduled by the Arlington clerk for February 18, 1993.

Ramdass' third "strike" was the capital murder of Mohammed Kayani. The jury found Ramdass guilty on January 29, 1993, and proceeded to the penalty phase, the prosecution arguing for the death penalty on the basis of Ramdass' future dangerousness. During sentencing deliberations, the jury asked the court: "[I]f the Defendant is given life, is there a *possibility of parole* at some time before his natural death?" (JA 154) (emphasis added). The court's only answer was to tell the jury to "impose such punishment as you feel is just. . . . *you are not to concern yourselves with what may happen afterwards.*" (JA 154-57) (emphasis added). The jury returned with a verdict of death.[1]

Judgment was, in fact, entered on the Domino's Pizza robbery on the scheduled February 18, 1993 date.

After Ramdass' conviction and sentence were upheld on direct review, the United States Supreme Court remanded for reconsideration in light of its recent decision in *Simmons*. The Virginia Supreme Court concluded that *Simmons* did not apply because Ramdass was technically eligible for parole at the time of his sentencing trial. The Court refused to count the Domino's Pizza robbery as the second "strike" because on January 30 – the day the jury inquired about the possibility of parole – "[j]udgment had not been entered on [the robbery] verdict;

---

[1] The court entered judgment and imposed this sentence on April 6, 1993. Under Virginia law, Ramdass could not have been released on parole between January 29, 1993 and April 6, 1993. *See* Code of Virginia § 53.1-151(A).

therefore, it cannot be considered as a conviction." *Ramdass v. Commonwealth*, 450 S.E.2d 360, 361 (Va. 1994), *cert. denied*, 514 U.S. 1085 (1995).[2]

Ramdass has consistently argued that he had a due process right to tell the jurors that if they sentenced him to life imprisonment for capital murder, there was no possibility he would be released prior to his natural death. The panel majority disagreed. It held that because Ramdass was technically eligible for parole on the date of the jury's inquiry and for 19 days thereafter, *Simmons* did not apply. "[O]nly those capital defendants who are parole ineligible *under state law* at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment." (Slip Op. at 13, underling added).

The panel minority and district court both viewed the refusal to inform the jury of the practical effect of the various convictions as arbitrary and violative of Ramdass' elemental due process right to deny or explain the Commonwealth's evidence of future dangerousness. Characterizing the entry of judgment on the Domino's Pizza robbery as a "ministerial act" which "guarantee[d] that Ramdass would be parole ineligible when the Kayani conviction was formally entered," the panel minority concluded that Ramdass "had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating

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[2] For purposes of this petition for rehearing only, Ramdass does not contest the correctness of that decision.

was officially entered by the judge, he would be ineligible under state law for parole." (Op. at 30).

ARGUMENT

I. THE MAJORITY PANEL DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *SIMMONS v. SOUTH CAROLINA* AND INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

It is respectfully submitted that the majority both failed to address a specific conflict with the Supreme Court's decision in *Simmons*, in which event at least panel reconsideration would be proper, and misinterpreted the core holding in *Simmons*, making rehearing *en banc* appropriate. To date, two federal judges (the district court and the minority in dissent) have opined that Ramdass' constitutional due process rights were violated, while two other federal judges have reached a contrary conclusion. The issue could not be closer. The situation presented here, of a defendant for whom there was no reasonable possibility of parole or release at the time of sentencing, is so close to the rule announced in *Simmons* that to distinguish it would result in unpredictable decisions based on the actions of docketing clerks and thus elevate forum shopping to Constitutional proportions.

The majority's reading of *Simmons* is so hyper-technical that the Supreme Court's decision loses its meaning and arbitrary results, such as here, are inevitable. Effectively, the majority held that a defendant, whom everyone concedes would never have been released from prison if sentenced to life, cannot tell his sentencing jury

of that fact because a ministerial act of entering judgment had not yet taken place. Nowhere in the majority's opinion is issue taken with the proposition that, when the jury *asked* whether there was any "possibility of parole" if a life sentenced was imposed, the accurate and truthful answer would have been "No." As the minority opinion clarifies, the ministerial act of imposing judgment on the Domino's Pizza conviction was so inevitable that (borrowing language directly from *Simmons*) "only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible." (Slip. Op. 29).

However, according to the majority, only when a defendant has legally been declared ineligible for parole *at the time of the sentencing itself*, can a defendant tell a jury that there is no possibility of parole, even if there is, in fact and law, no possibility of parole. This reading of *Simmons* reduces the constitutional due process right declared there to a minor legal footnote entirely dependent on the vagaries of individual state laws and clerk docketing procedures.

The error in the majority's reading of *Simmons* is dramatized by the following sentence in the opinion:

> If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, the Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact.

(Slip Op. 16).

That judgment, which the majority, the minority, the Commonwealth and everyone who has reviewed this case agree was inevitable and certain, unfortunately took place 19 days *later*. Essentially, Ramdass will be executed

* * *

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 17, 1999

No. 98-30
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner – Appellee

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections

Respondent – Appellant

No. 98-32
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner – Appellant

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections

Respondent – Appellee

On Petition for Rehearing and Rehearing En Banc

Appellee/cross-appellant filed a petition for rehearing and rehearing en banc and appellant/cross-appellee filed a response in opposition to the petition.

Judge Murnaghan voted to grant panel rehearing. Judges Widener and Niemeyer voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Murnaghan, Ervin, Michael and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler and King voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

SUPREME COURT OF THE UNITED STATES

No. 99-7000

Bobby Lee Ramdass,

v.

Ronald Angelone, Director, Virginia Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth circuit

ON CONSIDERATION of the Motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

January 7, 2000

Feb 22 2000 (8)

Supreme Court, U.S.
FILED
FEB 22 2000
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No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

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CAPITAL CASE
QUESTION PRESENTED

Simmons v. South Carolina holds that when a prosecutor seeks the death sentence on the ground of the defendant's future dangerousness, the defendant has a constitutional right to inform the jurors truthfully that if they spare his life, state law forbids him ever to be released from prison. Does the rule in *Simmons* turn on the actual operation of state law, or on its hypertechnical terms; and must a federal habeas court adjudicating a *Simmons* claim make its own analysis of the functional consequences of state law, or is it bound by the state courts' characterization of state law for federal constitutional purposes?

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

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JURISDICTION

The court of appeals issued its opinion on August 3, 1999. Ramdass filed a timely petition for rehearing, which the court of appeals denied on September 17, 1999. A petition for certiorari was filed on November 12, 1999, and granted on January 7, 2000. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., amend. XIV, § 1.)

This case also involves Virginia Code § 53.1-151 (Eligibility for Parole) and Virginia Supreme Court Rule 3A:15 (Motion To Strike or To Set Aside Verdict). The statute is reproduced in the appendix to this brief beginning at page App. 1 and the rule is reproduced at page App. 5.

STATEMENT OF THE CASE

A. The Crimes and the Trials

In the summer of 1992, just after being released on parole from a Virginia prison, petitioner Bobby Ramdass committed a series of violent robberies. These included the armed robbery of two customers at a Pizza Hut in Fairfax County, Virginia, on August 25, 1992; an armed robbery at a Domino's Pizza in Alexandria, Virginia, on August 30, 1992; and an armed robbery at a 7-Eleven in Fairfax County on September 2, 1992, during which a store clerk, Mohammed Kayani, was shot and killed. At the time of these offenses, Ramdass was 20 years old.

Ramdass was quickly apprehended, and a series of separate criminal proceedings followed. First, a Fairfax County jury found Ramdass guilty of the Pizza Hut robberies on December 15, 1992, and fixed his aggregate sentence at imprisonment for 76 years. *Ramdass v. Angelone*, 450 S.E.2d 360, 361 (Va. 1994) (J.A. 130, 281, 355,

385). The court entered judgment and imposed the jury's recommended sentence on January 22, 1993. *Id.* (J.A. 130).

Meanwhile, on January 7, 1993, an Alexandria jury convicted Ramdass of the Domino's Pizza robbery and fixed his sentence at 18 years imprisonment. *Id.* (J.A. 130, 281). The court subsequently entered judgment and imposed the jury's recommended sentence on February 18, 1993. *Id.* (J.A. 130, 281).

Three weeks after the Domino's Pizza guilty verdict, on January 28, 1993, a third state court jury, sitting in Fairfax County, found Ramdass guilty of capital murder for the death of the 7-Eleven employee, Mr. Kayani. (J.A. 4). The court conducted a capital sentencing trial before the jury the next day, January 29, 1993. (J.A. 7). At that proceeding, the prosecution's case for the death penalty rested exclusively on the statutory aggravating factor that Ramdass "would commit criminal acts of violence [in the future] that would constitute a continuing serious threat to society." Virginia Code § 19.2-264.4(C).

In support of this future-dangerousness aggravating factor, the prosecutor relied on the juries' previous verdicts in the Pizza Hut robbery (J.A. 9, 16-18, 53-55, 81), and the Domino's Pizza robbery (J.A. 57-59, 81). The prosecutor also brought to the jury's attention Ramdass's involvement in several as-yet-unadjudicated offenses: a robbery of a hotel clerk (J.A. 9-10, 18-23, 55-56, 81), a robbery and shooting of a taxi driver (J.A. 23-46), and the shooting of a drug dealer (J.A. 62-64). In addition, the prosecutor presented records of Ramdass's juvenile conviction for purse snatching (J.A. 15, 80) and an unarmed robbery that occurred in 1988, for which Ramdass was

tried as an adult and sentenced to seven years imprisonment. (J.A. 9, 12-14, 81).

The prosecutor emphasized the issue of parole during the sentencing trial. He elicited testimony showing that Ramdass had been released on parole in 1992, very shortly before the commission of the instant crimes, after serving only four years of the seven-year sentence for unarmed robbery. (J.A. 46-47, 61-62). In eliciting this fact, the prosecutor was careful to distinguish between "mandatory" and "discretionary" parole, and he established that Ramdass's parole release had been mandatory. (J.A. 46-47, 51-52, 61-62). Later, during his cross-examination of Ramdass, the prosecutor established that Ramdass had also been released on parole from a state juvenile institution (J.A. 60-62), that he was returned to the institution after violating that parole, and that despite his parole violation, he was nevertheless released again on a 30-day furlough from which he never returned. (J.A. 60-61). The prosecutor used his cross-examination of Ramdass to remind the jury that state prison authorities had "mandatorily released [Ramdass] on parole in May of '92" after he had served less than four years of a seven-year adult prison sentence. (J.A. 62). He returned to this subject in closing argument, stating:

> Finally in May of 1992, he's back on the streets of Fairfax County. When he finally got paroled in May of 1992, it's significant to note that this parole is for a robbery. The first time he was tried as an adult, he was tried for robbery in 1988. He serves a little over four years total for that robbery, in May he's released.

(J.A. 81). After again enumerating Ramdass's adjudicated and unadjudicated crimes, the prosecutor concluded:

> We submit to you members of the Jury, he is the epitome of dangerousness. He is a proven serious threat to society. The best indicator of future behavior is past behavior and he does it in spades.

(J.A. 82).

In an effort to rebut the future dangerousness aggravating factor and persuade the jury to vote for life imprisonment, defense counsel tallied the term-of-years sentences for Ramdass's adjudicated offenses and argued that, if these sentences were tacked together, they would total at least 99 years. (J.A. 49, 85). In his opening statement at the penalty phase, defense counsel squarely conceded that Ramdass "should be locked up for the rest of his life" (J.A. 51), and in closing argument he went even further:

> If you believe that Bobbie Lee's a wild, crazed animal, then society must do something. I agree with you, they must. We must.
>
> But I submit a wild animal removed from its environment is not merely destroyed. We cage it. We put it away for life and that is what you should do.
>
> * * * *
>
> How much does society need to exact? I agree he should be put away for [his crimes]. He should never see the light of day. But to take another human life, that's not right.

(J.A. 84-85). The core of defense counsel's argument on future dangerousness was that his client would not – and *should* not – ever "see the light of day." (J.A. 85). Counsel was barred by Virginia law, however, from saying anything about whether Ramdass's present or future terms of imprisonment might be cut short by release on parole, as the jury knew his prior juvenile and adult prison sentences had been. (J.A. 89-90). *See, e.g., Clark v. Commonwealth*, 257 S.E.2d 784, 792 (Va. 1979) (jury may not be informed of defendant's parole eligibility or ineligibility), *cert. denied*, 444 U.S. 1049 (1980); *Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978) (same).

In addition to arguing that society could adequately protect itself from Ramdass by imprisoning him for life, defense counsel presented mitigating evidence about Ramdass's deprived background. (J.A. 48-50). This evidence showed that Ramdass was the first child of an interracial marriage between a former topless dancer and a U.S. Army soldier of Pakistani origin. (J.A. 67-68). Ramdass's mother, Peggy Ramdass, was one of 21 children, and her own childhood had been marked by neglect, abuse, and incest. (J.A. 65-66, 186-187). Her parents and siblings, who were white, referred to Peggy and her dark-skinned sons as "nigger lovers," and refused to help them even when they became homeless and desperately poor. (J.A. 69). For his part, Ramdass's father consistently denied that Ramdass was actually his child: he beat Ramdass constantly, but spared Ramdass's younger brother Mark, whom he acknowledged as his son. (J.A. 68). Ramdass's father deserted his family when the children were

very young, and at the time of a 1988 presentence investigation, conducted when Ramdass was 17, the elder Ramdass was reportedly AWOL from the Army, and his whereabouts were unknown. (J.A. 51-51a).

After her husband's disappearance, Peggy Ramdass and her sons moved from place to place, and for a time were forced to live in the furniture storage bin of an apartment complex. (J.A. 69). When the boys were about six and seven years old, she taught them to steal food from grocery stores in order to eat, and to beg for money by pretending that they were soliciting for charity. (J.A. 69-70). She lost custody of her children twice. (J.A. 74-75). When the boys were about eight and nine years old, she began to live with a boyfriend identified as Sanchez. (J.A. 75). Sanchez abused both Peggy and the children, locking Ramdass in the closet and beating him with a belt buckle. (J.A. 75-76). At one point, Sanchez held Mark Ramdass out of a fifteenth floor window by his legs and threatened to drop him. (J.A. 76).

After the close of the evidence, the trial court instructed the jury that it could fix Ramdass's punishment at death only if it found "unanimously and beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing, serious threat to society." (J.A. 76a). The court also instructed the jury that it was permitted to fix Ramdass's sentence at life imprisonment, even if it found the future dangerousness aggravating factor. After deliberating for nearly three hours, the jury sent out the following question to the court:

> If the Defendant is given life, is there a possibility of parole at some time before his natural death?

(J.A. 88). Over defense counsel's objection, the court gave the response then required by Virginia law:

> If you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

(J.A. 91). The jurors deliberated for another hour and a half and then fixed Ramdass's sentence at death.

Before the court entered judgment on April 2, 1993, it conducted a sentencing hearing and heard additional argument from counsel.[1] Defense counsel asserted that under the "three strikes" provision of Virginia Code § 53.1-151(B1), Ramdass was, and at the time of trial had been, ineligible for parole. (J.A. 93-94). Defense counsel then reported that he had attempted to contact members of the sentencing jury to determine whether information about the possibility of parole would have affected their verdict. He reported that he was able to reach six jurors, and three of them (two men and one woman) were willing to speak. (J.A. 94-95). Counsel reported that each of these jurors said they personally would have voted for

[1] If the jury fixes the sentence at death, the trial court may nonetheless impose a life sentence after conducting the sentencing hearing. Virginia Code § 19.2-264.5. If the jury fixes the sentence at life, the trial court must impose a life sentence. Virginia Code § 19.2-264.4(A).

life imprisonment rather than death if they had known that Ramdass had no possibility of being released from prison.[2] (J.A. 95). Two jurors expressed the opinion that the jury as a whole would have voted for life imprisonment had its members known that Ramdass could not be released on parole. (J.A. 95). Counsel represented that because of the court's answer to the jury's question during deliberations, the jurors "all had a perception that [Ramdass] would be paroled" after approximately 20 years. (J.A. 95). Finally, counsel pointed to a study showing that the average Virginia juror believes a person sentenced to life imprisonment will serve only seven to ten years before being released on parole.[3] (J.A. 95). The state interposed no objection to counsel's report concerning the jurors' post-trial comments. After receiving this information, the trial court entered judgment and imposed the death sentence recommended by the jury. (J.A. 100-101).

B. Appeal, Certiorari, and Remand

On direct appeal, the Virginia Supreme Court affirmed the conviction and death sentence. *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993) (J.A. 102-120). In response to Ramdass's argument that his parole ineligibility should have been disclosed to the jury in answer

[2] If even one juror declines to fix the sentence at death, the court is required as a matter of law to impose a life sentence. Virginia Code § 19.2-264.4(E).

[3] *See* Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989), *also cited in Simmons v. South Carolina*, 512 U.S. 154, 170, n.9 (1994).

to its question about parole, the court said, "We repeatedly have held that a jury should not hear evidence of parole eligibility *or ineligibility* because it is not a relevant consideration in fixing the appropriate sentence." *Id.* at 573 (J.A. 117) (emphasis added). Shortly thereafter, this Court decided *Simmons v. South Carolina*, 512 U.S. 154 (1994), and remanded Ramdass's case for reconsideration in light of that case. *Ramdass v. Virginia*, 512 U.S. 1217 (1994) (J.A. 121).

On remand, Ramdass contended that *Simmons* had conclusively established that the trial court's refusal to answer his jury's inquiry about parole eligibility was federal constitutional error. (J.A. 123-127). Ramdass pointed out that he was not eligible for parole under Virginia's "three strikes" law, which provided in relevant part that:

> [a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

Virginia Code § 53.1-151(B1) (App. 1-4). Ramdass identified his three qualifying convictions as the Pizza Hut armed robberies, the Domino's Pizza armed robbery, and the capital murder during the 7-Eleven robbery. (J.A. 123-124).

The Virginia Supreme Court set out its understanding of the federal constitutional right at issue in the following preliminary paragraph:

> In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ___, 114 S. Ct. at 2198. Hence, *Simmons* applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Ramdass v. Commonwealth, 450 S.E.2d 360, 361 (Va. 1994) (J.A. 129-130) (emphasis in original). The court then undertook to determine whether Ramdass was technically ineligible for parole on the date of his capital sentencing trial. It acknowledged that the Pizza Hut robberies counted as Ramdass's first "strike" under the statute, and it held that the jury's verdict that Ramdass was guilty of capital murder counted as the second "strike." *Id.* (J.A. 130). The court refused, however, to count the jury's guilty verdict in the Domino's Pizza robbery as the third "strike." Noting that Virginia's three-strikes statute requires three "convictions," the court held that a jury verdict of guilty does not become a "conviction" until judgment is entered. *Id.* (J.A. 130-131) (citing *Smith v. Commonwealth*, 113 S.E. 707, 709 (Va. 1922) (interpreting word "conviction" as requiring entry of judgment for purpose of determining whether candidate was disqualified from holding public office)). The court concluded that because the Domino's Pizza verdict was not reduced to judgment until 19 days *after* the capital sentencing trial, Ramdass was technically still eligible for parole under state law on the day that the jury considered his sentence for capital murder. *Ramdass v. Commonwealth*, 450 S.E.2d at 361 (J.A. 131). Treating this analysis of the

word "conviction" as dispositive of Ramdass's constitutional rights under *Simmons*, the Virginia Supreme Court again affirmed his death sentence. *Id.* (J.A. 131). This Court denied Ramdass's ensuing petition for certiorari. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

C. Collateral Proceedings

Ramdass next filed a habeas corpus petition in the Virginia Supreme Court, alleging that his rights under the Fourteenth Amendment were violated by the trial court's refusal to inform the jury of his ineligibility for parole. (J.A. 145-149). The Virginia Supreme Court summarily dismissed the claim on the ground that it had already been addressed on the merits on direct appeal and would not be reconsidered on collateral review.[4] *Ramdass v. Director, Virginia Dept. of Corrections*, No. 951594 (Va. Mar. 18, 1996). (J.A. 151).

Ramdass then filed a federal habeas corpus petition. As his first claim, Ramdass alleged that the trial court violated his rights under the Fourteenth Amendment when it refused to provide the jurors with the truthful information that, if they sentenced Ramdass to life imprisonment, there existed no possibility of his being released on parole. (J.A. 152-183).

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[4] The Virginia Supreme Court cited the rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970), as the basis for its dismissal of Ramdass's claim. *Hawks* states that claims will not be considered in collateral proceedings if they were addressed on the merits in prior proceedings. Any claim dismissed under the rule in *Hawks* is deemed to be fully preserved for federal review on the merits. *See Correll v. Thompson*, 63 F.3d 1279, 1289 n.8 (4th Cir. 1995), *cert. denied*, 516 U.S. 1035 (1996).

After considering the parties' pleadings, a federal magistrate judge recommended that habeas relief be granted on this issue because the state court's decision on the federal constitutional question was "contrary to clearly established Federal law, as determined by the Supreme Court of the United States." (J.A. 298). The magistrate judge noted "that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was 'a possibility of parole at some time before his natural death.' " (J.A. 303). He concluded, "[t]his Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. . . . The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion." (J.A. 304).

Following *de novo* review, the federal district court agreed with the magistrate judge and granted the writ. *Ramdass v. Angelone*, 28 F. Supp. 2d 343 (E.D. Va. 1998) (J.A. 307). The district court gave two reasons. First, the Virginia Supreme Court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2):

> An obvious question arises from the [state] court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the

> verdict) constitute a second predicate conviction? . . . From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

Ramdass v. Angelone, 28 F. Supp. 2d at 365 (J.A. 357).

Second, even if the state court's decision was not based on an unreasonable determination of the facts, "by concluding that petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of *Simmons*." *Id.* at 367 (J.A. 362). The state court's decision thus "involved an 'unreasonable application' of *Simmons* as determined by the Supreme Court of the United States." *Id.* at 368 (J.A. 363). The district court further noted:

> [E]veryone [except the jury] was aware that, at the time of the capital sentencing phase, petitioner had either plead[ed] guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish petitioner's future dangerousness. The jury could have been informed, with all confidence, that petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society.

Id. at 367 (J.A. 362).

A divided panel of the Fourth Circuit reversed. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (J.A. 380). The majority quickly rejected the district court's conclusion that the state court's decision was based on an unreasonable determination of the facts:

> As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. . . . Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

Id. at 407 (J.A. 400) (citations omitted).

The majority then rejected Ramdass's contention that he was *functionally* ineligible for parole, and held that *Simmons* applies only in the narrow circumstance where a defendant is *technically* and *legally* ineligible for parole on the date of the capital sentencing proceeding. The majority essentially advanced three reasons. First, it announced that *Simmons* turns solely on the state court's determination of state law, and that this determination is dispositive:

> [T]he fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

Id. at 406 (J.A. 399) (emphasis omitted).

Second, the majority said that conditioning the application of *Simmons* on a pragmatic determination that the defendant will never be eligible for release on parole "is simply incompatible with the logic of *Simmons* itself." *Id.* at 405 (J.A. 397). According to the majority, this logic is discernible from the phrasing of such statements in *Simmons* as " 'We hold that where the defendant's future dangerousness is at issue, and *state law* prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.' " *Id.* at 405 (J.A. 397) (quoting *Simmons* plurality opinion, 512 U.S. at 156) (Fourth Circuit's emphasis).

Third, the Fourth Circuit majority held in the alternative that relief could not be granted under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). "Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that was not 'clearly established' as required by 28 U.S.C. § 2254(d)(1)," as enacted by AEDPA. *Ramdass v. Angelone*, 187 F.3d at 406 (J.A. 399). After discussing the similarities between § 2254(d)(1) and the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), the majority added that Ramdass's claim would fail "either under *Teague* or under § 2254(d)(1)." *Ramdass v. Angelone*, 187 F.3d at 406-07 (J.A. 400).

Circuit Court Judge Murnaghan dissented on each point. First, he emphasized that "the scope and parameter of the *Simmons* right is a matter of federal constitutional law." *Id.* at 413 (J.A. 417). "Admittedly, the [due process] right recognized in *Simmons* . . . only applies to those for

whom state law has eliminated the possibility of parole. But, the right is a federal right." *Id.* (J.A. 416). He explained that federal due process was denied because Ramdass was ineligible for parole consideration absent some hypothetical future development of the sort that *Simmons* specifically disregarded:

> [A]t the time of the . . . [7-Eleven] sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. . . . Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible [under state law] when the . . . [7-Eleven] conviction was formally entered.

Id. at 415 (J.A. 419-420).[5]

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[5] Entry of judgment clearly was a ministerial act under state law in the circumstances of this case. At the time of the penalty phase in Ramdass's capital murder trial, the judge presiding over the Domino's Pizza matter already had denied Ramdass's motion to strike the evidence as insufficient to sustain the robbery conviction, and that motion could not be renewed. Virginia Supreme Court Rule 3A:15(a) (App. 5). There was a hypothetical possibility that the judge presiding over the Domino's Pizza matter could, in the future, set aside the robbery verdict in that case under Virginia Supreme Court Rule 3A:15(b) on the ground that the evidence was insufficient or that error was committed at trial, and thus eliminate the third "strike." There was, however, an identical hypothetical possibility that the judge presiding over the Pizza Hut matter could, in the future, set aside the robbery verdict in *that* case under Rule 3A:15(b), and thus eliminate the first "strike." In both robbery

Second, Judge Murnaghan declared that, far from being incompatible with the logic of *Simmons*, an assessment of the realistic possibility of parole that is based on the actual operation of state law is consistent both with "the genesis of *Simmons* . . . [as] merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349 . . . (1977), and *Skipper v. South Carolina*, 476 U.S. 1 . . . (1986)," and with the specific language in the *Simmons* opinions. *Ramdass v. Angelone*, 187 F.3d at 414 (J.A. 417). He concluded that under *Simmons*,

> regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Ramdass had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole.

Id. at 415 (J.A. 420-421).

Third, because the clearly established rule in *Simmons* fully covers Ramdass's circumstances, Judge Murnaghan recognized that neither the AEDPA or *Teague* presents any impediment to the grant of federal habeas corpus relief.

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cases, the statutory 21-day window for setting aside a conviction under Rule 3A:15(b) was still open at the time of Ramdass's capital sentencing trial. The Virginia Supreme Court necessarily rejected any consideration of or reliance upon the hypothetical possibility of future release under Rule 3A:15(b) when it held that the Pizza Hut conviction counted in full as a "strike."

The Fourth Circuit denied Ramdass's petition for rehearing en banc on September 17, 1999, with four judges dissenting. (J.A. 429-430).

SUMMARY OF THE ARGUMENT

The Virginia Supreme Court's charge, on remand from this Court, was to determine whether Ramdass's rights under the Due Process Clause were infringed when he was not permitted to inform the jurors that if they sentenced him to life imprisonment, there was no possibility that he could be released on parole before his natural death. The federal question (was there a violation of due process) thus overlay a state-law question (was there a possibility of release on parole under state law).

The Virginia Supreme Court begged the federal question. Its adjudication was limited to an examination of state law and a determination that on the date of the capital sentencing trial, Ramdass was eligible for parole because he did not yet have three "convictions" as the state court defined that word. This analytical approach was flawed for the same reason that the state court's analysis was flawed in *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942). When a right arises under federal law and overlays state law, a reviewing court errs if it looks only at subsidiary technical definitions under state law and assumes that those definitions circumscribe the federal right. *Id.* at 774. Rather, when the federal question concerns the nature or duration of restraints on liberty, the Court has held that a

reviewing court should consider the functional realities of the situation rather than technical definitions.

This Court's precedents, going back more than a century, establish that when a federal question rests on top of a state-law question, the state court's characterization of its own law is not dispositive of the federal question. For purposes of deciding the federal question, the reviewing court must look to the actual consequences of state law. This rule holds true regardless of the nature of the case – civil, criminal, or collateral. *See, e.g., Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952) (state can determine operating incidence of its own tax, but for purposes of deciding whether that tax offends Commerce Clause, court must look to consequences of the tax); *Bailey v. Alabama*, 219 U.S. 219 (1911) (state can characterize criminal statute as one that merely punishes fraud, but for purposes of deciding whether statute violates Thirteenth Amendment by compelling involuntary servitude on pain of imprisonment, court must look to actual effect and operation of statute).

Under this well-established rule, Virginia can define the incidence of its parole law however it wishes, and Ramdass will have no federal basis for complaint. But it is equally plain that the federal due process issue in Ramdass's *Simmons* claim is governed by how Virginia's parole law actually operates, not by the label affixed by state law. The Virginia Supreme Court did not consider how state law actually operated, and the Fourth Circuit did not correct that error.

In Ramdass's case, state law *in actual operation* foreclosed any possibility that he could be released on parole

before his natural death. He had two of the three "strikes" required for parole ineligibility by state law, and entry of judgment for the third "strike" was a ministerial act whose performance was foreseeable, imminent, and inexorable.

The validity of Ramdass's claim under *Simmons* is proved by this Court's analysis in *Simmons* itself, which was based on the practical and foreseeable operation of South Carolina law rather than a technical determination of parole eligibility on a particular date. As the undisputed record clearly shows, Simmons was technically still eligible for parole at the time of his capital sentencing trial, and he could not be declared ineligible for parole until the parole board later determined whether his proffered "strikes" were for unrelated crimes. *See* Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003, at 95-96 (filed Dec. 14, 1993). The Court was clearly cognizant of that fact. Based on the pragmatic and foreseeable operation of state law, however, this Court considered Simmons's ineligibility for parole to have been conceded. *See, e.g., Simmons*, 512 U.S. at 166 (plurality opinion) ("Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate.")

The fact that a Virginia trial court had not yet performed the ministerial act of entering judgment on Ramdass's third "strike" is of no more consequence than the fact that the South Carolina parole board had not yet formally determined whether Simmons's prior convictions were for unrelated offenses. The only obstacle to either of these predictable formalities was the sort of

"hypothetical future development" that this Court dismissed out of hand in *Simmons*. Everyone knew that the trial judge would enter the judgment and make Ramdass ineligible for parole, just as everyone knew that the South Carolina parole board would declare that Simmons's prior crimes were unrelated and make him ineligible for parole.

The Court's interchangeable use of terms such as "parole ineligibility," "imprisonment without possibility of parole," and "never would be released on parole" underscores the pragmatic nature of this Court's *Simmons* analysis. Just as Simmons had a due process right to inform the jury even though he was technically still eligible for parole on the date of his capital sentencing trial, so did Ramdass.

Even if the South Carolina parole board had formally declared that Simmons was ineligible for parole before the capital sentencing, however, Ramdass would be entitled to relief because there was (and is) no possibility that he could ever be released on parole before his natural death. This Court's due process concern, expressed in both the plurality opinion and Justice O'Connor's concurring opinion, was that jurors should be permitted to make a realistic assessment of the threat to society that the defendant would pose in the future if he was sentenced to life imprisonment. The threat that Ramdass posed to society depended on whether, as a pragmatic matter, there was any possibility that he could be released on parole in the future; it did not depend on whether he was *technically* eligible or ineligible for parole on the single day of his capital sentencing trial.

ARGUMENT

The ultimate issue before the Virginia Supreme Court on remand was whether, in light of *Simmons v. South Carolina*, 512 U.S. 154 (1994), Ramdass's rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution were infringed when the trial court refused to inform the jury that the only available alternative to a sentence of death was life imprisonment without the possibility of parole. The federal question (whether there was a violation of the Fourteenth Amendment) thus rested on top of the state-law question (whether, under state law, Ramdass would ever have the opportunity to be released on parole). This case therefore involves a simple problem that the Court has encountered and resolved many times before: Where a federal right overlays state law, does the federal question turn on the state's technical *characterization* of its own law, or does it depend on the operational *consequences* of state law?

Preliminarily, it is noteworthy that the Virginia Supreme Court begged the federal question presented. Its adjudication was limited to an examination of state law and a determination that on the date of the capital sentencing trial, Ramdass's formal status under that law was not one of "parole *ineligibility*," *Ramdass v. Commonwealth*, 450 S.E.2d at 361 (Va. 1994) (J.A. 130) (emphasis in original), because he did not yet have three qualifying convictions. In restricting its analysis to the technical meaning of the word "conviction" under state law and deeming the answer to the state-law question to be dispositive of any federal question, the Virginia Supreme Court committed the same analytical error this Court described in

Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769 (1942).

In *Bakery and Pastry Drivers*, the state courts had enjoined a union from engaging in informational picketing on the ground that this was a federally protected activity only if its purpose was "the dissemination of information concerning the facts of a labor dispute," *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), and there was no "labor dispute" as that term was defined by New York law. This Court reversed, succinctly describing the state court's conceptual error:

> So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a "labor dispute" as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter.

Bakery and Pastry Drivers, 315 U.S. at 774.

Simmons similarly establishes that a capital defendant need not already be technically ineligible for parole on the date of his capital sentencing trial in order to have a right under the Fourteenth Amendment to inform the jurors that, in its actual operation, state law forecloses any possibility of his release on parole. *See* Section B *infra*. By looking only at the definition of the word "conviction" under state law, the Virginia Supreme Court disregarded

this federal right and undid indirectly what it was prohibited from undoing directly.

A. The Lower Courts Engaged in the Wrong Analysis

1. Questions Concerning the Nature or Duration of Restraints on Liberty Require a Functional, Rather Than a Technical, Mode of Analysis

There can be no disagreement as to the practical and foreseeable reality of Ramdass's situation: The trial judge in the Domino's Pizza case was going to enter judgment 19 days after the capital sentencing trial, and from that day forth until the day he died, Ramdass would have no possibility of release on parole.[6] No state or federal court judge has questioned that immutable fact. Nonetheless, because a ministerial requirement of state law had not yet been satisfied, the Virginia Supreme Court employed, and the Fourth Circuit majority ratified, a reading of *Simmons* that disregarded the functional reality of parole ineligibility.

Simmons falls within a line of cases from this Court that address the need to define category boundaries when

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[6] Because Ramdass already had been sentenced to 76 years in prison for the Pizza Hut robberies, he had no possibility of being released on parole during the 19 days before entry of the Domino's Pizza verdict. *See* Virginia Code § 53.1-151(A) (defendant cannot be considered for release on parole until he has served, at a minimum, the lesser of twelve years in prison or one quarter of his sentence). Thus, from the date of the capital sentencing trial forward, there was not a single day on which Ramdass could have been considered for release on parole.

a rule of federal constitutional or statutory law refers to a condition or status that is both a practical fact and a legal term of art. In closely analogous areas of the law that involve constitutional questions concerning the nature or duration of restraints on individual liberty, this Court has resolved the problem by rejecting solutions that "place[ ] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987).

For example, in applying the requirement under *Miranda v. Arizona*, 384 U.S. 436 (1966), that warnings must precede police interrogation when a person is "in custody," this Court has rejected a technical definition of "custody" derived purely from the legal rules governing police powers of arrest and detention, and employed instead a *functional* analysis of whether the circumstances reasonably would lead the person being interrogated to believe that he or she is not free to leave the station house at will. *See, e.g., Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation"); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (officer's obligation to administer *Miranda* warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody' ").

In determining whether an individual is "in custody" for purposes of federal habeas corpus jurisdiction, the Court likewise has consistently applied a functional rather than a technical test. In *Jones v. Cunningham*, 371 U.S. 236 (1963), for example, the Court held that a state prisoner who has been released on parole is nonetheless

functionally "in custody" because he or she is still subject to various conditions and restrictions.

> [The Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.

Id. at 243. And in *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Court held that a state prisoner's pending habeas petition was not *functionally* moot for want of custody, even though his sentence had since expired and he had been discharged from parole.

Under state law, as it actually operated, Ramdass was forever precluded from release on parole. *See* Subsection A.3 *infra*. That is what his sentencing jury wanted to know, and that is what *Simmons* entitled him to have the jury know. The Virginia Supreme Court's and the Fourth Circuit's avoidance of the rule of *Simmons* under these circumstances leaves an important federal due process right subject to the vagaries of highly technical, sometimes arcane, and certainly manipulable state-court characterizations of state law, even when there is no possibility that the defendant can ever be considered for parole. The rulings of these lower courts are at odds with this Court's disposition of similar constitutional questions, and the decision below should be reversed.

2. Federal Questions Require a Mode of Analysis That Looks to the Operating Consequences of Relevant State Law, Rather Than to the State's Characterization of That Law

In focusing on a technical assessment of parole eligibility, the Virginia Supreme Court improperly limited its analysis to (i) characterizing Ramdass's status as a matter of state law and (ii) treating the applicability of the federal constitutional rule of *Simmons* as controlled by that characterization. *See Bakery and Pastry Drivers, supra*. The Fourth Circuit failed to correct this error, deeming the state's characterization of its own law to be dispositive of the federal question. Such an analytical approach is contrary to this Court's well-established precedents. For more than a century, the Court has held consistently and in a wide variety of contexts – civil, criminal, and collateral – that when federal law overlays state law, the proper resolution of federal questions depends on the operational consequences of state-law rules, not on the characterization that a state court or legislature puts on those rules.

In *Bailey v. Alabama*, 219 U.S. 219 (1911), for example, the Court considered whether the Thirteenth Amendment was violated by a state statute that (i) made it a criminal offense for a laborer to enter into an employment contract with intent to injure or defraud and then, after obtaining a salary advance from the employer, to refuse to perform the promised service or return the advance; and (ii) made refusal or failure to perform the service or refund the money *prima facie* evidence of the requisite intent to injure or defraud. Although the state characterized the statute as one that merely punished fraud, this Court concluded

that, for purposes of the federal question presented, the consequence of the statute was to employ the threat of criminal prosecution as a means of compelling involuntary servitude for mere breach of contract. *Id.* at 238.

> We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Id. at 238. Because the statute, in actual operation, compelled the employee to perform the contracted-for service on pain of imprisonment, it violated the Thirteenth Amendment. *Id.* at 293-94.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court considered whether the Due Process Clause was infringed by a Maine statute that required a defendant charged with murder to prove he acted without malice in order to reduce the homicide to manslaughter. Affirming Wilbur's murder conviction, the Maine Supreme Judicial Court held that murder and manslaughter were not distinct crimes but were different degrees of the single generic offense of felonious homicide, that malice was presumed if the killing was intentional, and that the severity of the sentence could be reduced if – but only if – the defendant proved an absence of malice. *Id.* at 687-88. In habeas corpus proceedings, the lower federal courts concluded that murder and manslaughter were distinct

offenses and that, under *In re Winship*, 397 U.S. 358 (1970), the Due Process Clause required the prosecution to prove malice in order to obtain a conviction for the greater offense. This Court preliminarily rejected the lower federal courts' analytical approach, reminding them that they were bound by the state court's definition of the offense. For purposes of the federal question, however, the Court explained that the state court's single-offense characterization was not dispositive:

> *Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State," *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914).

Wilbur, 421 U.S. at 699. The Court then held that because state law, in its actual operation, made malice an essential element of the single offense, *Winship* required the state to carry the burden of persuasion on that element. *Id.* at 703-04.

In *Hicks v. Feiock*, 485 U.S. 624 (1988), the Court considered whether the Due Process Clause was infringed when, in contempt proceedings for repeated failure to make child-support payments, the defendant had the burden of proving that he was financially unable to make the payments. Failing this burden, the defendant was sentenced to five days in jail for each count and ordered to repay his accumulated arrearages. The state court concluded that the proceedings were quasi-criminal in nature, that ability to pay was an element of the charge of contempt rather than an affirmative defense, and that California law unconstitutionally shifted the burden of

persuasion to the contemnor. This Court acknowledged that it was not at liberty to depart from the state court's determination that ability to pay is an element of the offense. *Id.* at 629-30. For purposes of the federal question, however, the critical determination was whether the contempt proceedings were criminal in nature, in which case the burden-shifting violated federal due process, or civil in nature, in which case the burden-shifting was permissible.

> [T]he argument is not merely that the state court misapplied state law, but that the characterization of this proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law. . . . The fact that this proceeding and the resultant relief were judged to be criminal in nature as a matter of state law is thus not determinative of this issue, and the state appellate court erred insofar as it sustained respondent's challenge to the statute under the Due Process Clause simply because it concluded that this contempt proceeding is "quasi-criminal" as a matter of California law.

Id. at 630. Looking at the actual operation of state law, the Court concluded that for purposes of the federal question, the correct classification of the contempt proceedings turned on whether the contemnor would purge his sentence by paying the arrearage, and it remanded for a determination of that issue. *Id.* at 640-41.

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952), the Court considered whether the

Commerce Clause was infringed by a privilege tax that Mississippi imposed on individuals soliciting orders for out-of-state laundries. The Mississippi Supreme Court had held that under state law, Memphis Steam Laundry's truck drivers were "transient vendors or dealers" subject to the tax. It then characterized the levy as "a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and nonresidents alike." *Id.* at 391. Based on this characterization, it concluded that the application of the tax to Memphis's drivers did not offend the Commerce Clause. *Id.* For purposes of deciding the federal question, however, this Court looked to the consequences of the tax, not the state court's characterization of it. "The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.' " *Id.* at 392. Concluding that the *effect* of the levy was to tax the privilege of doing interstate business, the Court held that it violated the Commerce Clause. *Id.* at 393-94.

In *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954), another tax case, the Court considered whether a tax that was measured by gross receipts violated the Commerce Clause when applied to a company whose business was wholly in interstate commerce. The Virginia Supreme Court characterized this levy as an intangible property tax imposed on the difference between the "bare-bones" value of the business's tangible property in Virginia and the going-concern value of that same property. Based on this characterization, it held that the tax did not violate the federal Constitution. *Id.* at 363. This

Court reversed, explaining that the state court's characterization of the tax was not dispositive of the federal question:

> While great respect is due these conclusions, it has long been held that . . . "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S.A.R. Co. v. State of Texas*, 210 U.S. 217, 227 (1908), in which inquiry "we are concerned only with its practical operation." *Lawrence v. State Tax Com.*, 286 U.S. 276 (1932).

Railway Express, 347 U.S. at 363. Looking at "the practical effect of the tax," the Court held that its "impact is squarely upon gross receipts without consideration of their effect on the value of . . . [the] property," and as such constituted an impermissible state tax upon interstate commerce. *Id.* at 364-66.

In *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259 (1875), the Court considered whether the Commerce Clause was infringed by a New York statute that required the owner of every ship to give a $300 bond, with a covenant for four years, for each new immigrant who disembarked in New York, but allowed the bond requirement to be commuted if the owner paid $1.50 for each immigrant within 24 hours of arrival. The New York Court of Errors agreed with the state legislature that the bond was an indemnification against each new immigrant's need for public support for the four years after his arrival. It therefore held that the bond did not unduly burden foreign commerce. This Court explained that the

state court's characterization was not dispositive of the federal question:

> In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the Port of New York, it is . . . a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city.

Id. at 268. Looking at the consequence of the statute, the Court first found it inevitable that the owner of a ship would not give a sizable bond for each of the thousands of passengers he transported to New York each year, but instead would pay $1.50 per head and would collect that amount from each passenger before embarkation. *Id.* Notwithstanding the state's characterization of its own law, the Court then concluded that the function of the statute was not to protect against the future consequences of pauperism, because the bond was as much required for wealthy and hard-working immigrants as it was for diseased persons or paupers who might quickly become objects of charity. *Id.* at 268-69. Because the state bond, in operation, charged foreign passengers for the right to make the voyage, it violated federal law. *Id.* at 274-75.

In *Collins v. New Hampshire*, 171 U.S. 30 (1898), the Court considered whether the Commerce Clause was infringed by a New Hampshire statute that prohibited the sale of oleomargarine as a substitute for butter unless it was colored pink. This Court had previously held in

Schollenberger v. Pennsylvania, 171 U.S. 1 (1898), that a state statute altogether prohibiting the introduction of oleomargarine violated the Commerce Clause. Upholding Collins's criminal conviction for selling oleomargarine that was not the proper color, the New Hampshire Supreme Court characterized its statute as one that merely prescribed the addition of a harmless coloring agent. The state court explained that the statute did not unduly burden interstate commerce because the manufacturer could sell his product freely and at any price. This Court disagreed:

> The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Collins, 171 U.S. at 33-34. For purposes of the Commerce Clause question, the Court found that the consequence of the coloration requirement was to make the oleomargarine repugnant to customers to the point where they would not purchase it at any price. *Id.* Because this condition, if complied with, would effectually prevent any sale, the statute, in actual operation, suffered from the same federal constitutional vice as the statute in *Schollenberger*.

3. However the Virginia Supreme Court May Characterize the Circumstances That Result in Parole "Ineligibility" Under State Law, Ramdass Was Certain Never To Have an Opportunity To Be Paroled and Was Entitled To So Inform the Jury Under *Simmons*

As the foregoing cases confirm, Virginia can define the incidence of its parole laws however it wishes, and Ramdass will have no federal basis for complaint. But the cases are equally plain that the federal constitutional rule of *Simmons* is not regulated by the Virginia Supreme Court's characterization of state law. Even if parole "ineligibility" in Virginia requires three "convictions" in the sense of convictions-reduced-to-judgment (as the Virginia Supreme Court said in rejecting Ramdass's *Simmons* claim), those state-law labels are not dispositive of the federal constitutional question of what *Simmons* commands. The Fourth Circuit's abdication to state-law characterization as controlling the scope of *Simmons* was simply wrong.

The scope of *Simmons* depends on the actual operation of state law, not on the terms in which a state court may choose to describe its workings. In the instant case, state law *in actual operation* foreclosed any possibility that Ramdass could be released on parole before his natural death. Ramdass incontestably had two of the three "strikes" required by state law; and the entry of judgment for the Domino's Pizza armed robbery – which would constitute the third qualifying conviction and therefore the third "strike" – was foreseeable, imminent, and inexorable. The Domino's Pizza jury had found Ramdass guilty of that armed robbery. Ramdass had twice moved

to strike the evidence on the ground that it was insufficient to sustain that verdict; the trial court had denied the motion both times; and state law did not allow Ramdass to renew the motion. *See* Virginia Supreme Court Rule 3A:15(a). To make the jury's verdict into a "conviction" (in the terminology of the Virginia Supreme Court), there was nothing more for the court to do but perform the ministerial act of entering judgment.

To be sure, there was still a purely hypothetical possibility that the Domino's Pizza trial judge could set aside the verdict under Virginia Supreme Court Rule 3A:15(b) on the ground that the evidence was insufficient or that error was committed at trial.[7] The window of opportunity for a defendant to move under Rule 3A:15(b) remains open until 21 days after entry of judgment. But there was an identical possibility that the Pizza Hut trial judge could set aside the jury's verdict in *that* case under Rule 3A:15(b). That is so because the judgment in the Pizza Hut trial had been entered on January 22, 1993, one week before the capital sentencing trial. *Ramdass v. Angelone*, 450 S.E.2d at 361 (J.A. 130). That meant that the 21-day window for the Pizza Hut offense did not close until

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[7] No one has ever suggested that there was any basis in law or in fact for the trial court to set aside the Domino's Pizza verdict under Rule 3A:15(b) (App. 5). Indeed, given that the prosecution's cross-examination of Ramdass at the capital sentencing trial had elicited his judicial confession to the Domino's Pizza robbery (J.A. 57-59), it was inconceivable that Ramdass would somehow escape judgment and sentence for that robbery.

February 12, 1993, which was fourteen days *after* Ramdass's capital sentencing trial. If the hypothetical possibility of a setting-aside of the verdict under Rule 3A:15(b) was insufficient to affect the status of the Pizza Hut offense as a "strike" – as the Virginia Supreme Court's opinion on remand recognized – then it could not affect the status of the Domino's Pizza offense as a "strike" either.

And the Virginia Supreme Court's dismissal of the hypothetical possibility of future challenges under Rule 3A:15(b) is consistent with this Court's dismissal of the same kind of hypothetical possibilities in *Simmons*: "To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force." *Simmons*, 512 U.S. at 166 (plurality opinion). Short of just such "hypothetical future developments," state law foreclosed any chance that Ramdass could ever be released.[8]

[8] In its pleadings below and in its opposition to certiorari, Virginia has persistently conflated Ramdass's contention that his case is governed by *Simmons* because state law makes it impossible for him ever to be *considered for parole*, with a claim that *Simmons* requires an instruction about a defendant's unlikely *prospects for parole* in the sense of the unlikelihood that a parole board would deem him *suitable for a grant* of parole. This is a red herring. Ramdass has never argued that courts should consider parole suitability in deciding whether a defendant is entitled to an instruction under *Simmons*.

B. The *Simmons* Court Itself Looked at the Consequences of State Law Rather than the State's Characterization, and the Facts Demonstrating This Also Show That Ramdass's Case Is Indistinguishable from Simmons's Case on Both the Facts and the Law

The validity of Ramdass's claim under *Simmons* is proved by this Court's analysis in *Simmons* itself. Both the plurality and concurring opinions in *Simmons* were based on the practical and foreseeable operation of South Carolina law rather than on a technical determination of parole eligibility under state law on a particular isolated date. Confronted with an argument from South Carolina that Simmons was not technically ineligible for parole and that he could, in any event, be released by some other means, the *Simmons* plurality dismissed the state's argument as having "little force." *Simmons*, 512 U.S. at 166.

The Virginia Supreme Court and the Fourth Circuit appear to have assumed that Jonathan Dale Simmons was technically ineligible for parole and that this factual distinction took Ramdass's case out of the core rule of *Simmons*. In truth, however, Simmons had never been declared ineligible for parole (as was technically required for ineligibility under South Carolina law), and he was "ineligible" for parole at the time of his capital sentencing trial only in a pragmatic sense. Thus, the facts that demonstrate this Court's analytical approach in *Simmons* also demonstrate that Ramdass's case is indistinguishable.

1. The *Simmons* Facts and This Court's Analysis

At the time of Simmons's trial, firmly established South Carolina law vested parole eligibility decisions solely in the Probation, Parole and Pardon Board. *State v. McKay*, 386 S.E.2d 623 (S.C. 1991). Based on this authority, South Carolina's brief in this Court represented that:

> First and foremost, at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). *Accord Williams v. Commonwealth, supra*; [*State v.*] *Torrence*, [406 S.E.2d 315], 323 [(S.C. 1991)] ("there is no way [for the court] to be assured that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]").

Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, at 95-96; 1993 WL 669003 at *95-96 (filed Dec. 14, 1993) (brackets in parenthetical in original). In other words, Simmons was not ineligible for parole under state law *until the parole board said so*, and at the time of his trial there was a theoretical possibility that the board might

say otherwise.[9] Although the General Counsel to the Department of Corrections made a proffer *in camera* that if Simmons was convicted of murder, he would serve a sentence of life without parole, this testimony was qualified by the caveat that Simmons would be ineligible for parole "*assuming* that was . . . [a] second conviction not related to the first violent offense. . . . " Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 13; 1993 WL 669003 at *13a (emphasis added).

In his reply brief, counsel for Simmons acknowledged that Simmons had not yet been found ineligible for parole but said that "[t]his assertion, though technically true, is irrelevant." Petitioner's Reply Brief in *Simmons v.*

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[9] Simmons was convicted of murder for beating an elderly woman to death. One week before the start of the murder trial, Simmons pleaded guilty to two other assaults on elderly women. Simmons assumed that those assaults constituted his first "strike," and the murder conviction counted as his second "strike" – a circumstance that would have rendered him ineligible for parole under South Carolina law. But it was at least theoretically possible that, when it passed on his case some weeks or months afer the capital sentencing trial, the parole board would rule that the murder and the other two assaults, though separated by 14 months, were sufficiently related to each other to be regarded as part of a "continuous course of conduct." Such a ruling would have left Simmons eligible for parole, because a subsequent conviction would not count as a second "strike" if it occurred either within 24 hours of the previous offense *or* if it was part of a continuous course of conduct. *See* S.C. Code § 24-21-640 (1993 Supp.). At the time of Simmons's sentencing, no South Carolina case had construed this statutory provision, and as *State v. McKay* had already made clear, South Carolina sentencing courts lacked authority to make such parole eligibility determinations in the first instance.

South Carolina, No. 92-9059, at 1; 1993 WL 625970 at *1 (filed Dec. 27, 1993). Simmons's counsel contended that it was irrelevant because, when Simmons eventually was classified by the parole board, he was sure to meet the statutory criteria for ineligibility under S.C. Code § 24-21-640. Thus, a future declaration to this effect by the parole board would be a mere formality.

The Court was fully cognizant that Simmons was ineligible for parole only as a pragmatic fact, though not yet as a matter of law. "[Simmons] proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility. On petitioner's behalf, attorneys for the South Carolina Department of Corrections . . . testified that any offender in petitioner's position was *in fact* ineligible for parole under South Carolina law." *Simmons*, 512 U.S. at 158 (plurality opinion) (emphasis added). Passing over South Carolina's argument that Simmons was not *technically* eligible for parole as a matter of law, this Court considered Simmons's ineligibility for parole to have been effectively conceded. "Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate." *Id.* at 166 (plurality opinion); *see also id.* at 176 (O'Connor, J., concurring) ("the only available alternative sentence to death in petitioner's case was life imprisonment without possibility of parole"). The Court obviously could not have described any of South Carolina's statements as an *admission* of parole ineligibility unless it was looking at the actual and foreseeable operation of state law rather

than employing a technical state-law definition of "ineligible."[10]

South Carolina also offered other, equally strained "possibility of release" arguments, pointing to statutory provisions for commutation and clemency that might have resulted in Simmons's eventual release into society; and it argued that such possibilities made a parole ineligibility instruction "inherently misleading."[11] *Id.* at 166 (plurality opinion). The Court found all of this argumentation of "little force." *Id.*

2. Ramdass's Case Is Functionally Equivalent to Simmons's Case

The fact that a Virginia court had not yet performed the ministerial act of entering judgment on Ramdass's conviction for the Domino's Pizza robbery is of no more consequence than the fact that the South Carolina Parole Board had not yet formally determined whether one or

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[10] At oral argument, counsel for South Carolina said nothing to contradict the position, advanced in his brief, that Simmons was not technically ineligible for parole until the parole board made the required finding. Transcript of Oral Argument in *Simmons v. South Carolina*, No. 92-9059, at 23-50; 1994 WL 663636 at *23-50 (Jan. 18, 1994).

[11] South Carolina's "possibility of release" arguments did not include the prospect that Simmons might move for a new trial on one of the offenses that counted as a "strike" toward parole ineligibility, but it easily could have done so. Indeed, South Carolina, unlike Virginia, allows defendants to move for a new trial at any time based on newly discovered evidence, so long as the motion is made within a reasonable time after discovery of that evidence. *See* S.C.R. Crim. P. 29(b).

both of Simmons's prior convictions were for separate, unrelated offenses under South Carolina parole law. The only obstacles to either of these predictable formalities were the sort of "hypothetical future developments" that this Court dismissed out of hand.

The eventual outcome – which, of course, has now come to pass – was at least as much a foregone conclusion in Ramdass's case as it was in Simmons's case. Everyone except Ramdass's capital sentencing jury knew that the trial judge presiding over the Domino's Pizza matter was going to make Ramdass ineligible for parole by performing the ministerial act of entering judgment, *see* Subsection A.3, *supra*, just as everyone believed that the South Carolina parole board was going to make Simmons ineligible for parole by finding that the murder and prior assaults were unrelated and therefore counted as separate "strikes." No court throughout the present proceedings has quarreled with this unavoidable conclusion. The actual and foreseeable operation of state law was bound to render Ramdass, like Simmons, ineligible for parole.

The fact that Jonathan Dale Simmons was technically eligible for parole but functionally ineligible for actual release from prison by parole underscores the pragmatic nature of this Court's *Simmons* analysis. It is consistent with the repeated, interchangeable references throughout the *Simmons* opinions to "parole ineligibility," *see Simmons*, 512 U.S. at 169 (plurality opinion) ("Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention"); "imprisonment without possibility of parole," *id.* at 177 (O'Connor,

J., concurring) ("I agree that due process requires that the defendant be allowed to . . . [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"); and the fact that Simmons "never would be released on parole," *see id.* at 165 (plurality opinion), or "never would be released from prison," *id.* at 178 (O'Connor, J., concurring). In short, the Court's square holding in *Simmons* was that Simmons had a due process right to inform the jury truthfully that he could never be released from prison on parole, even though he was technically still eligible for parole consideration under state law on the date of his capital sentencing trial. Ramdass had the same due process right regardless of the fact that he was technically eligible for parole until the foreordained moment when the Domino's Pizza judge performed the ministerial act of entering judgment.

3. The Rule in *Simmons* Would Apply to Ramdass Even If Jonathan Simmons Had Been Technically Ineligible for Parole

Ramdass's entitlement to relief does not rest solely on the fact that, for all material purposes, his case is a clone of Simmons's case. Even if Jonathan Dale Simmons had been declared legally and technically ineligible for parole before the date of his capital sentencing trial, as the Virginia Supreme Court assumed, Ramdass would come fully within the core rule in *Simmons*.

The holding in *Simmons*, expressed in the plurality opinion, is as follows:

> We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Simmons, 512 U.S. at 156. Notably, the words "parole ineligib[ility]" appear here only in the description of the phrase to be given to the jury. They are not used in this Court's description of the condition precedent – a finding that "state law prohibits the defendant's release on parole." In Ramdass's case, Virginia law, in its actual and foreseeable operation, "prohibit[ed] the defendant's release on parole." From the date of his capital sentencing trial until the date of his death, there would never be a point where state law permitted him to be released on parole. That circumstance entitled Ramdass to inform the jury, in the language of the final clause of the *Simmons* holding, that he was "parole ineligible." Parole ineligibility in this context flowed from the fact that state law prohibited the defendant's release on parole, not from a technical and formalistic determination of parole eligibility under state law.

The careful wording of the *Simmons* holding is consistent with the Court's due process concern, expressed in both the plurality and concurring opinions, that jurors be permitted to make an informed and realistic assessment of the threat to society that is posed by a sentence of life imprisonment. *Id.* at 171 (plurality opinion) ("The State may not create a false dilemma by advancing generalized

arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole"); *id.* at 177 (O'Connor, J., concurring) ("I agree that due process requires that the defendant be allowed to [inform the jury] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future"). The threat that Ramdass posed to society had everything to do with whether, as a pragmatic matter, there was any possibility that he could be released on parole in the future; it had nothing to do with whether he was *technically* eligible or ineligible for parole on the single day of his capital sentencing trial.

* * *

If there is any difference between *Simmons* and this case, it is that what happened here was even more egregiously unfair. Whether the prosecution actually alleged Jonathan Simmons's future dangerousness as a reason to sentence him to death was open to dispute. *See Simmons*, 512 U.S. at 180-81 (Scalia, J., dissenting). In this case, however, the prosecution's claim that Ramdass posed a risk of further criminal violence was the sole legal basis of its request for the death penalty. And while the subject of parole was never mentioned in open court at Simmons's trial until the jury asked about it, Ramdass's prosecutor saw to it that the jury learned all about the defendant's prior releases on parole, and the fact that Ramdass was on parole when he committed the capital murder for which he was being sentenced. Under state

law, the actual possibility that either Simmons or Ramdass would have the opportunity to be considered for parole in the future was equally non-existent. But the evidence in this case placed both the issue of future dangerousness and the illusion of future parole release even more squarely before the sentencing jury than had the evidence in *Simmons*. Under these circumstances, the Virginia Supreme Court's refusal to vacate Ramdass's death sentence was manifestly "contrary to" *Simmons*, *see* 28 U.S.C. § 2254(d)(1), and constitutionally indefensible.

CONCLUSION

The judgment of the Fourth Circuit below endorses a decision of the Virginia Supreme Court that is flatly inconsistent with *Simmons* and with this Court's repeated teachings that the power of state courts to announce rules of state law does *not* include the power to dictate the federal constitutional consequences of the state-law rules they announce. The judgment should therefore be reversed, and this case should be remanded with

directions to reinstate the judgment of the district court granting relief on Mr. Ramdass's *Simmons* claim.

Respectfully submitted,

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

CODE OF VIRGINIA
TITLE 53.1. PRISONS AND OTHER METHODS OF CORRECTION.
CHAPTER 4. PROBATION AND PAROLE.
ARTICLE 3. PROCEDURES GOVERNING PAROLE.

§ 53.1-151 Eligibililty for parole.[1]

A. Except as herein otherwise provided, every person convicted of a felony and sentenced and committed by a court under the laws of this Commonwealth to the Department of Corrections, whether or not such person is physically received at a Department of Corrections facility, or as provided for in § 19.2-308.1:

1. For the first time, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years;

2. For the second time, shall be eligible for parole after serving one-third of the term of imprisonment imposed, or after serving thirteen years of the term of imprisonment imposed if one-third of the term of imprisonment imposed is more than thirteen years;

3. For the third time, shall be eligible for parole after serving one-half of the term of imprisonment imposed, or after serving fourteen years of the term of imprisonment imposed if one-half of the term of imprisonment imposed is more than fourteen years;

---

[1] The version of Virginia Code § 53.1-151 reproduced here is the one that was in effect at the time of Ramdass's trial.

4. For the fourth or subsequent time, shall be eligible for parole after serving three-fourths of the term of imprisonment imposed, or after serving fifteen years of the term of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years.

For the purposes of subdivisions 2, 3 and 4 of subsection A and for the purposes of subsections B1 and B2, prior commitments shall include commitments to a correctional facility under the laws of any state or of the United States for murder, rape, robbery by the presenting of firearms or other deadly weapon, or manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, if such would be a felony if committed in the Commonwealth, provided the current sentencing order contains a finding of such prior commitments. Only prior commitments interrupted by a person's being at liberty, or resulting from the commission of a felony while in a correctional facility of the Commonwealth, of any other state or of the United States, shall be included in determining the number of times such person has been convicted, sentenced and committed for the purposes of subdivisions 2, 3 and 4 of subsection A. "At liberty" as used herein shall include not only freedom without any legal restraints, but shall also include release pending trial, sentencing or appeal, or release on probation or parole or escape. In the case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment. In any case in which a parolee commits an offense while

on parole, only the sentence imposed for such offense and not the sentence or sentences or any part thereof from which he was paroled shall constitute the term of imprisonment.

B. Persons sentenced to die shall not be eligible for parole. Any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole.

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

B2. Any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in this section between each conviction, shall not be eligible for parole.

C. Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class 1 felony violation or the first degree murder of a child under the age of eight in violation of § 18.2-32, he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to subsection B1 or B2.

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

E. A person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.

F. If the sentence of a person convicted of a felony and sentenced to the Department is partially suspended, he shall be eligible for parole based on the portion of such sentence execution of which was not suspended.

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in §§ 53.1-191, 53.1-197 and 53.1-198.

H. The time for eligibility for parole as specified in subsection D of this section shall apply only to those criminal acts committed on or after July 1, 1976.

I. The provisions of subdivisions 2, 3 and 4 of subsection A shall apply only to persons committed to the Department of Corrections on or after July 1, 1979, but such persons' convictions and commitments shall include all felony convictions and commitments without regard to the date of such convictions and commitments.

VIRGINIA RULES ANNOTATED
RULES OF SUPREME COURT OF VIRGINIA
PART THREE A Criminal Practice and Procedure

RULE 3A:15. Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial.

(a) Motion to Strike Evidence. – After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by the Rule.

(b) Motion to Set Aside Verdict. – If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) Judgment of Acquittal or New Trial. – The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

Mar 23 2000

(9)

Supreme Court, U.S.
FILED
MAR 23 2000
CLERK

No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

MARK L. EARLEY
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General
Counsel of Record
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CAPITAL CASE
QUESTION PRESENTED

May the due process right to a no-parole instruction identified by this Court for the first time in *Simmons v. South Carolina* be extended to a state prisoner on federal collateral review who does not dispute the fact that under state law he was eligible for parole on a life sentence when his capital jury sentenced him to death?

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STATEMENT OF THE CASE

I. Ramdass' Offenses

Between August 25 and September 2, 1992, Bobby Ramdass and his gang engaged in a series of brutal armed robberies at five locations in Northern Virginia. On August 25, 1992, Ramdass and three accomplices robbed two persons at gunpoint at a Pizza Hut restaurant in Fairfax. During that robbery, one of the victims was abducted and the other was struck by Ramdass. (JA 17-18). On August 29, 1992, Ramdass and one accomplice entered the Bragg Tower apartment hotel in Alexandria and robbed Christopher Crissel, the clerk, at gunpoint. During that robbery, Ramdass struck Mr. Crissel in the jaw with his fist and then pistol-whipped him in the head. (JA 19-23).

On the afternoon of August 30, 1992, Ramdass and two accomplices robbed Emanuel Selassie, a taxicab driver in Arlington. After taking Mr. Selassie's money at gunpoint, Ramdass shot him in the head and left him for dead.[1] Later that same night, Ramdass committed another armed robbery of an employee in a Domino's Pizza restaurant in Alexandria. (JA 57-58).

Then, on September 2, 1992, Ramdass and four accomplices entered a 7-Eleven store in Fairfax where Ramdass proceeded to rob Mohammed Kayani, the clerk, at gunpoint and then shoot him in the head. Mr. Kayani

---

[1] Mr. Selassie miraculously survived after an extensive hospital stay during which he remained unconscious for two weeks and underwent major surgery. (JA 28, 41-45).

died as a result of massive bleeding. *See Ramdass v. Commonwealth*, 437 S.E.2d 566, 568-569 (Va. 1993). (JA 104-105).

II. The Trial

Ramdass was tried for the capital murder of Mr. Kayani by a jury in the Circuit Court of Fairfax County. The jury found Ramdass guilty on January 28, 1993, of capital murder during the commission of robbery and using a firearm in the commission of that offense. Ramdass pleaded guilty to the related charge of robbery. On January 29, 1993, in a separate sentencing hearing, the Commonwealth presented evidence of Ramdass' extensive criminal history and asked the jury to find that Ramdass "would constitute a continuing serious threat to society" under Virginia's "future dangerousness" aggravating factor and to sentence him to death. *See* Va. Code § 19.2-264.4(C).

As part of its sentencing case, the Commonwealth presented evidence of an unarmed robbery Ramdass had committed at the age of sixteen, as well as other juvenile offenses. (JA 12-15 and Tr. 1/29/93 at 22-25). It also presented evidence that Ramdass had been tried, convicted and sentenced for the Fairfax Pizza Hut robberies. (Tr. 1/29/93 at 31).

The Commonwealth presented the testimony of Mr. Crissel from the Bragg Tower robbery. On cross-examination, Ramdass brought out the fact that he had not yet been tried for that offense and that it was set for trial in Alexandria. (*Id.* at 42-43). The Commonwealth presented several witnesses involved in the attempted murder and

robbery of Mr. Selassie, the taxicab driver. (JA 23-45). Finally, the Commonwealth presented Ramdass' parole officer who testified that Ramdass' summer crime spree had occurred while he was still under parole supervision. (JA 46-47).

In its opening statement in the sentencing phase, the defense told the jury, without objection, that the evidence

> will show you that [Ramdass] will serve, right now before you impose a sentence, the next ninety-nine years of his life in jail for the sentences that have been imposed.
>
> It will show you that he is pending trial in Alexandria for the Fort Bragg apartment incident, robbery, for which as you've seen from all the other charges, will have him facing at least one life sentence and another four years.
>
> He has yet to be sentenced in the Domino Pizza robbery in Alexandria, of which he has been convicted. At least another life sentence.
>
> ***Bobbie Lee Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.***

(JA 49-50, emphasis added). Ramdass presented numerous witnesses, including his brother who testified about Ramdass' childhood, his run-ins with the authorities from the age of thirteen and his juvenile incarcerations. (Tr. 1/29/93 at 104 *et seq.*). Ramdass also called a parole officer to testify as to her investigation of Ramdass' background in connection with one of his earlier offenses. (*Id.* at 115 *et seq.*).

Bobby Ramdass testified on his own behalf, admitting his guilt in the capital murder, the Pizza Hut robberies, the Bragg Tower robbery, the taxicab driver's attempted murder and robbery, the Domino's Pizza robbery and other crimes. (JA 54-64). He told the jury that he had been sentenced to serve seventy-six years in prison for the Pizza Hut robberies in Fairfax and that an Alexandria jury had found him guilty of the Domino's Pizza robbery and had recommended an eighteen-year sentence, but that he had not yet been sentenced for that crime. (CA4 App. 136-137). He explained that he was scheduled to be tried the following month in Alexandria for the Bragg Tower robbery. (*Id.* at 157).[2]

At the conclusion of all the evidence, the jury was instructed on the law. (JA 76a-77). Ramdass did not request an instruction regarding his parole status. During the subsequent closing arguments, the defense argued that

> ***Bobbie Lee is going to jail for the rest of his life.*** The numbers have been run by you, ninety-nine plus years. There are cases in Court, matters still outstanding. . . . He should never see the light of day. . . . I ask you to give him life. Life, he will never see the light of day, but may you not take his life.

---

[2] Eight months after his Fairfax capital murder trial, Ramdass pleaded guilty in Alexandria to a murder he had committed on July 15, 1992. During the sentencing hearing on the Fairfax capital murder, the prosecutor cross-examined Ramdass regarding the Alexandria murder, but Ramdass denied any involvement. (JA 63-64). The prosecutor presented no evidence about that separate murder.

(JA 85, emphasis added). The prosecutor did not object to, comment on or challenge this defense argument in any way. The jury retired at 4:20 p.m. (JA 87). At 7:02 p.m., the jury sent out a written question: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (JA 88). Ramdass did not request an instruction that he would not be released on parole. Instead, he suggested that the court answer the question as follows:

> You must not concern yourself with matters that will occur after you impose your sentence, but you may impose [sic] that your sentence will be the legal sentence imposed in the case.

(JA 89). The court instead accepted the Commonwealth's suggestion that settled precedent from the Virginia Supreme Court required the following response taken from a Virginia model jury instruction:

> You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

(JA 91). After giving the instruction, the jury was excused for the night. It reconvened the following morning at 9:00 and, at 10:25 a.m., the jury returned with its verdict, fixing petitioner's sentence at death. (Tr. 1/30/93 at 3).

A post-verdict hearing was held on April 2, 1993. The court considered a probation officer's investigation of Ramdass' background "to the end that the court may be fully advised as to whether the sentence of death is appropriate and just." *See* Va. Code § 19.2-264.5. Ramdass presented testimony from his mother and from himself.

His attorneys argued that the judge should impose a life sentence because Ramdass never would be eligible for parole under Virginia Code § 53.1-151(B)(1). (JA 94). They also argued that they had spoken to three unnamed jurors who allegedly said they would have voted for a life sentence if they had known that Ramdass would have been ineligible for parole. (JA 95). The court sentenced Ramdass to death in accordance with the recommendation of the jury. The court also sentenced him to life imprisonment for the robbery and to four years in prison for the illegal use of a firearm. (JA 101).

III. The Direct Appeal

On appeal to the Virginia Supreme Court, Ramdass argued that his due process rights had been violated because the trial court had failed to instruct the jury that he would have been ineligible for parole. Ramdass recited Virginia's "three-time loser" parole statute, § 53.1-151(B)(1), and then noted that he had been convicted and sentenced on six separate robbery charges dating back to 1988.[3] (CA4 App. 168). He did not discuss when the convictions were imposed, whether they

[3] Section 53.1-151(B)(1) provided that,

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

qualified under § 53.1-151(B)(1), or when he became ineligible for parole.

On November 5, 1993, the Virginia Supreme Court affirmed the sentence of death in a unanimous opinion. (JA 102). Regarding the parole instruction argument, the Court ruled that "[w]e repeatedly have held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." (JA 117). The Court approved the standard response given by the trial court to the jury's question. (JA 118). In his petition for a writ of certiorari filed in this Court on March 15, 1994, Ramdass repeated the argument he had made in the Virginia Supreme Court. (Record No. 93-8309).

This Court had heard oral argument in *Simmons v. South Carolina*, 512 U.S. 154 (1994), on January 18, 1994. *Simmons* was decided on June 17, 1994, and, on June 20, 1994, this Court granted Ramdass' certiorari petition, vacated the judgment of the Virginia Supreme Court and remanded the case for reconsideration in light of *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217 (1994). (JA 121).

On remand, the Virginia Supreme Court ordered further briefing and oral argument. Ramdass argued that *Simmons* required vacatur of his sentence because he was ineligible for parole. According to Ramdass, he was ineligible for parole under § 53.1-151(B)(1) because, prior to his capital murder trial, he had been convicted in 1988 of robbery and on January 22, 1993, of the Pizza Hut robberies. (JA 123-124). The Commonwealth argued in response that Ramdass was not ineligible for parole at the time of his capital murder trial and could not have been

rendered parole ineligible by a life sentence for the capital murder. The Commonwealth explained that the 1988 robbery did not qualify under § 53.1-151(B)(1) because it involved no deadly weapon and that the first qualifying conviction under § 53.1-151(B)(1) was the Pizza Hut robberies which were part of "a common act, transaction or scheme" and for which Ramdass had been sentenced. The Commonwealth also explained that the capital conviction could have counted only as the second of the three convictions required for ineligibility under § 53.1-151(B)(1). Therefore, if on January 30, 1993, Ramdass' jury had imposed a life sentence, Ramdass would not have been ineligible for parole under § 53.1-151(B)(1). Finally, the Commonwealth explained that, if given a life sentence for the capital crime, Ramdass would not have been rendered ineligible for parole until the third qualifying conviction was imposed on February 18, 1993, for the Domino's Pizza robbery, ***after the capital jury had rendered its sentencing verdict***. (CA4 App. 193-195).

Ramdass did not dispute the Commonwealth's fact-based argument, although the Virginia Supreme Court's briefing order expressly had allowed for a reply. (*Id.* at 182). The Virginia Supreme Court rendered its unanimous opinion on November 4, 1994. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994). (JA 128). The Court ruled as follows:

> In *Simmons*, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2198. Hence, *Simmons* applies

only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1-151(B) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass' penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B)(1). They were:

(1) Ramdass' January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B)(1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B)(1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under

> Code § 53.1-151(B)(1). *See Smith v. Commonwealth*, 134 Va. 589, 592-593, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

(JA 129-131).[4]

Ramdass did not petition the Virginia Supreme Court for rehearing. *See* Rule 5:39, Rules of the Supreme Court of Virginia (allowing such petitions). Ramdass instead filed a petition for a writ of certiorari in this Court in which he argued for the first time that the Virginia Supreme Court had misapplied Virginia law in determining that he was not ineligible for parole. (JA 133-138). This Court denied the petition on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

IV. The Post-Conviction Proceedings

In his state habeas corpus petition filed in the Virginia Supreme Court, Ramdass repeated the argument he had made on direct appeal. He did not challenge the Virginia Supreme Court's determination of parole eligibility under § 53.1-151(B)(1). (JA 146-148). The Virginia

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[4] A chart summarizing Ramdass' offenses by description and date of trial and judgment appears in Appendix A.

Supreme Court dismissed the petition on March 18, 1996, and refused to relitigate the issue under its rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970) (absent change in circumstances, a previous determination of issue is conclusive). (JA 151).

Ramdass' federal habeas petition was filed on February 14, 1997, in the United States District Court for the Eastern District of Virginia in Norfolk. Ramdass challenged the Virginia Supreme Court's eligibility determination on a number of bases, but primarily on the grounds that the state court allegedly had misinterpreted and misapplied Virginia law and had no authority in the first place to determine his eligibility. (JA 162-167). Ramdass also argued that the Virginia Supreme Court's ruling was arbitrary and that *Simmons* required relief even if he was eligible for parole as determined by the Virginia Supreme Court; however, he never proffered an instruction regarding his parole status that he believed should have been given to the jury. (JA 167-168). A magistrate judge recommended that the writ be granted on the basis that the Virginia Supreme Court had erred in its determination of Virginia law (JA 299-303) and that *Simmons* was not "limited to the very narrow issue of specific parole eligibility or lack thereof." (JA 304).

The district court judge subsequently found Ramdass' claim of "arbitrary" action by the Virginia Supreme Court procedurally barred because it had not been raised in state court. *Ramdass v. Angelone*, 28 F. Supp. 2d 343, 356-357 (E.D. Va. 1998). (JA 333). He otherwise agreed with the magistrate judge, however, and directed that the writ issue on the grounds that the Virginia Supreme Court had "contradicted more than one hundred years of

Virginia law" (JA 350-351) and that, in any event, relief was warranted because, despite Ramdass' parole eligibility status under § 53.1-151(B)(1), "the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole." (JA 362). The district court concluded that the Virginia Supreme Court's decision was an unreasonable application of clearly established law and an unreasonable determination of the facts under 28 U.S.C. § 2254(d). (JA 363).

On the Director's appeal to the United States Court of Appeals for the Fourth Circuit, Ramdass argued that this Court had not conditioned its rule in *Simmons* on a state's determination of parole ineligibility "at the moment of sentencing." (Brief of Petitioner, CA4 No. 98-30, 2/22/99, at 16). He argued that *Simmons* looked rather to "the functional and common-sense possibility of parole." (*Id.*). He also argued that, contrary to the Virginia Supreme Court's express interpretation of Virginia law, § 53.1-151(B)(1) did not require that he be sentenced on three qualifying convictions in order to be rendered ineligible, but merely that he have been ***found guilty*** on three qualifying offenses. (*Id.* at 20-21, n.9). Finally, he argued that it was unfair to conclude that he was not entitled to a no-parole instruction even if he was not ineligible for parole at the time of his capital sentencing because he ***would become*** ineligible "three short weeks thereafter," and because he "inevitably ***would reach*** a point where he could never be considered for release." (*Id.* at 23, emphasis added). Again, however, Ramdass did not articulate what be believed the jury should have been instructed on the matter.

A three-judge panel of the Fourth Circuit reversed the district court's erroneous decision to grant the writ. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999). (JA 380). It held first that *Simmons* requires a determination of whether the defendant is eligible for parole and that such determination is a matter of state law, rather than the federal issue defined by Ramdass as a "nonlegalistic 'commonsense impossibility of parole.' " (JA 396-398). Second, the Court of Appeals held that Ramdass' nebulous standard for determining parole was contrary to Fourth Circuit precedent. (JA 398). Third, it held that, "as a matter of simple logic," ***any*** determination of a state prisoner's parole eligibility has no meaning beyond what state law dictates. (JA 399).

Fourth, the Court of Appeals held that Ramdass' proposed "standard" was not "clearly established" under § 2254(d)(1), and also ran afoul of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), because it asked for an extension of what *Simmons* requires. (JA 399-400). Finally, the Fourth Circuit held that Ramdass' "insinuation" that the Virginia Supreme Court had "acted craftily in denying his *Simmons* claim" was completely unfounded: the Virginia rule that a conviction cannot count for parole eligibility purposes unless and until a final sentencing order has been entered comports with the "age-old rationale" that before negative consequences (such as parole ineligibility) may be imposed based upon a conviction, a defendant is accorded added protection by a definition of "conviction" limited to orders which actually have been entered. (JA 401-403). In Ramdass' case, the Fourth Circuit accurately observed that the random order in which his trials and sentencing proceedings had

taken place was entirely foreseeable, given the fact that he had committed so many felonies in such a short period of time. (JA 401).

Fourth Circuit Judge Murnaghan dissented on the *Simmons* issue because, even though Ramdass was eligible for parole – and properly found to be so by the Virginia Supreme Court (JA 414) – it was, in his opinion, a "practical reality" that Ramdass would be parole ineligible "upon entry of the Kayani [capital murder] conviction." (JA 415). Under Judge Murnaghan's erroneous interpretation of Virginia law, moreover, entry of the Domino's Pizza conviction – the third qualifying conviction under § 53.1-151(B)(1) – was nothing more than a "ministerial act" mandated by state law. (*Id.*). Thus, according to Judge Murnaghan and squarely contrary to what the Virginia Supreme Court had ruled, it made no difference to the application of § 53.1-151(B)(1) that the judgment in the Domino's Pizza case had not actually been entered at the time Ramdass' capital sentencing jury asked its question about parole eligibility.

In his petition for rehearing filed in the Fourth Circuit, Ramdass adopted Judge Murnaghan's argument and, for the first time, expressly abandoned his other arguments that supposedly demonstrated how the Virginia Supreme Court had erred in its interpretation of Virginia law. (JA 425 n.2). The Fourth Circuit denied both the petition for rehearing and the petition for rehearing *en banc*. (JA 429-430).

In his petition for a writ of certiorari, Ramdass contended that the Fourth Circuit had erred in ruling that *Simmons* was limited by the state court's determination of

parole eligibility, in ruling that he was denied no right under *Ake v. Oklahoma*, 470 U.S. 68 (1995), and in its application of § 2254(d). This Court granted certiorari but limited its review to the *Simmons* issue alone. *Ramdass v. Angelone*, 120 S.Ct. 784 (2000).

SUMMARY OF ARGUMENT

In *Simmons*, this Court created a new rule of criminal procedure by which a defendant in a capital murder case is entitled to answer the State's argument for a finding of future dangerousness by informing the jury that a life sentence will render him ineligible for parole as a matter of state law. In Ramdass' case, the Virginia Supreme Court held that, under Virginia Code § 53.1-151(B)(1), a defendant must have three or more qualifying convictions before losing parole eligibility and that a "conviction" for purposes of the statute means a conviction upon which final judgment has been entered by the trial court.

At the time Ramdass' capital jury was deciding whether to return a sentencing verdict of life or death, Ramdass had been convicted of only one offense qualifying under § 53.1-151(B)(1) and upon which a final judgment had been entered. The Virginia Supreme Court held that Ramdass' sentence for capital murder thus could count only as a second qualifying conviction under § 53.1-151(B)(1). It further held that a third offense upon which a verdict of guilt had been rendered, but upon which a final judgment had not been entered at the time of the capital sentencing, did not qualify at the time of the capital sentencing as a conviction for purposes of the

state statute. The Virginia Supreme Court therefore held that Ramdass was not entitled under *Simmons* to provide inaccurate information to the jury that a life sentence would render him ineligible for parole.

Ramdass claims now that the rule in *Simmons* does not depend upon the state court's characterization of a defendant's parole eligibility status and that a federal court on collateral review may find, under a "functional" view of parole eligibility, that a defendant was in fact ineligible for parole despite the state court's ruling to the contrary. Ramdass' claim, however, is an impermissible request for an extension of *Simmons* that was neither clearly established nor compelled by *Simmons*. The rule he seeks thus is prohibited by both 28 U.S.C. § 2254(d)(1) and by this Court's "new rule" doctrine.

ARGUMENT

THE RULE SOUGHT BY RAMDASS WAS NOT DICTATED BY *SIMMONS* OR ANY CLEARLY ESTABLISHED PRECEDENT AT THE TIME HIS CASE BECAME FINAL.

A. Ramdass' Claim

Ramdass always has conceded that, in order for him to prevail under *Simmons*, he must demonstrate his parole ineligibility. After the Virginia Supreme Court determined in 1994 that Ramdass was not entitled to relief under *Simmons* because he could not have been rendered parole ineligible by a life sentence for the capital murder, Ramdass argued that the Virginia Supreme Court's parole eligibility determination was a mistake.

At some point during his federal collateral case, however, he recognized that his challenge to the Virginia Supreme Court's determination of state law could not result in federal collateral relief. He changed his approach and asked the federal courts instead to reinterpret *Simmons* so as to afford him relief. Because he was faced with the plain language of *Simmons* that clearly predicates relief upon a determination of parole ineligibility under state law, Ramdass asked for a ruling that would redefine ineligibility as a "common-sense impossibility of parole" without regard to, and even in defiance of, the state court's express contrary determination of eligibility under state law.

It is important to understand the scope of Ramdass' claim. He is asking that federal habeas courts be authorized to determine parole eligibility *de novo*, and even to determine a matter of state law contrary to the highest state court. Under the facts of his case, however, the effect of granting his request would be to create a new right by which a capital defendant in a future dangerousness case would be entitled to inform his sentencing jury, not just that a life sentence will render him ineligible for parole, but also, under some "common sense" theory, about "any possibility that he could be released on parole in the future." (Pet. Br. at 47).

To be precise, Ramdass claims that *Simmons* entitled him to inform his sentencing jury of hypothetical future developments which, under Virginia law, would render

him ineligible for parole if they occurred.[5] Ramdass urges that, because one of those hypotheticals later came to fruition in his case, he is ***now*** entitled to the benefits under *Simmons* which would have existed if the hypothetical had occurred prior to his capital sentencing proceeding. He asserts nothing less than that he was entitled to tell his jury something that ***might*** occur simply because it ***did*** occur later.

In the truest sense, he is claiming, not that he was denied the right to tell his jury ***accurate*** information, but rather that he was denied an opportunity to impart ***false*** information. Ramdass' jury already had been informed of all accurate information: it knew that Ramdass had been sentenced for the Pizza Hut robberies to seventy-six years, that a jury had recommended an eighteen-year sentence for the Domino's Pizza robbery and that he had not yet been tried for the Bragg Towers and taxicab driver robberies. It also knew – because defense counsel told it so – that Ramdass would spend the rest of his life in prison as a result of all the sentences he would receive. (JA 49-50, 85). What Ramdass now says he should have been allowed to argue – that he would be ineligible for parole on his capital murder conviction – simply was not the truth.[6] Moreover, it is an obvious extension of the rule

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[5] See discussion below at pages 34-36, regarding Ramdass' mischaracterization of the Domino's Pizza conviction as "inexorable" under Virginia law.

[6] Because the jury had before it all the facts regarding Ramdass' other sentences and pending trials for the other offenses, and because defense counsel was allowed to tell the jury, without objection or rebuttal by the Commonwealth, that his sentences would result in him spending the rest of his life in prison, Ramdass cannot demonstrate the actual prejudice necessary to a grant of federal habeas corpus relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (error must have "had substantial and injurious effect or influence in determining the jury's verdict").

in *Simmons* and therefore forbidden by the statutory standard of review that governs this collateral case.

B. The Standard of Review

Ramdass does not dispute that the standard of review governing his claim is mandated by 28 U.S.C. § 2254(d).[7] In *Lindh v. Murphy*, 521 U.S. 320, 334 (1997), this Court observed that § 2254(d) provides a "highly deferential standard for evaluating state court rulings." In *Terry Williams v. Taylor*, No. 98-8384, this Court presently is considering the interpretation of § 2254(d)(1). In *Williams*, the Warden has argued that § 2254(d)(1) abolished *de novo* review by federal courts unless the state court decision was patently unreasonable. In order to obtain relief under § 2254(d)(1), the prisoner must show either that the state court failed to select and apply a clearly established federal law, *i.e.*, the decision was "contrary to . . . ," or that the state court's adjudication of mixed questions of law and fact was so unreasonable that all reasonable jurists would have felt compelled to rule in the prisoner's favor, *i.e.*, the decision was an "unreasonable application. . . . " (See No. 98-8384, Resp. Br. at 25-30). Williams has argued that § 2254(d)(1) preserves *de*

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[7] His federal § 2254 petition was filed on February 14, 1997, making the provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), including § 2254(d), applicable to his case. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

novo review and simply codifies this Court's "new rule" doctrine under *Teague*. (See No. 98-8384, Pet. Br. at 35).

The Fourth Circuit's judgment in Ramdass' case encompasses both interpretations of the statute which are currently under review in *Williams*.[8] Regarding § 2254(d)(1), the Fourth Circuit held,

> [t]his statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal habeas law." *Green v. French*, 143 F.3d 865, 873 (4th Cir. 1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague*. . . . In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n.9 (4th Cir. 1999). . . . Thus, either under *Teague* or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail.

(JA 399-400). Whether Ramdass' case is reviewed under a "stricter than *Teague*" view of § 2254(d)(1) or under Williams' "*Teague* as is" view of § 2254(d)(1), the forthcoming decision in *Williams* can have no significant effect on the Fourth Circuit's judgment.

Pursuant to the language of § 2254(d)(1), a writ of habeas corpus "shall not be granted" to Ramdass unless the Virginia Supreme Court's adjudication of his *Simmons* claim "resulted in a decision that was contrary to, or

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[8] Ramdass does not challenge the Fourth Circuit's definition of the governing standard.

involved an unreasonable application of, clearly established Federal law, as determined by [this] Court."[9] Pursuant to the "new rule" doctrine, habeas relief may not be granted unless it can be said that the Virginia Supreme Court acted objectively unreasonably by not extending to Ramdass relief under *Simmons*, *see O'Dell v. Netherland*, 521 U.S. 151, 156 (1997), or, put another way, that the Virginia Supreme Court was compelled by *Simmons* to rule in Ramdass' favor. *See Gray v. Netherland*, 518 U.S. 152, 166 (1996). Examination of this Court's decision in *Simmons*, however, makes clear that, as the Fourth Circuit found, the rule Ramdass seeks was neither "clearly established" under § 2254(d) nor "compelled" under the "new rule" doctrine.

C. The Rule in *Simmons*

The language in both the *Simmons* plurality opinion and in Justice O'Connor's concurring opinion[10] could not

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[9] Section 2254(d)(2) also allows relief where the petitioner demonstrates that the state court decision was based upon an unreasonable determination of the facts. The district court based its decision to grant relief on both (d)(1) and (d)(2). However, as the Fourth Circuit explained, "the parole eligibility determination is a question of law, not fact." (JA 400). Indeed, the facts relevant to the parole eligibility determination never have been in dispute and Ramdass has abandoned any argument now that he is entitled to relief under § 2254(d)(2). That subsection thus is inapplicable to this case.

[10] As Justice O'Connor supplied the necessary fifth vote and concurred on grounds narrower than those of the plurality, her concurrence is the controlling opinion. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), *citing Marks v. United States*, 430 U.S. 188, 193 (1977).

be more explicit. Application of the "new rule" this Court created in *Simmons*, *see O'Dell*, 521 U.S. at 166, was preconditioned on two factors: (1) the prosecution must have argued for the death penalty based upon the defendant's "future dangerousness;" and (2) the defendant must be rendered ineligible for parole by a life sentence. The only factor at issue in Ramdass' case is the latter: Ramdass argues that parole eligibility is not limited by what the state court says it is.

The language used in both the plurality and concurring opinions of *Simmons*, however, simply forecloses Ramdass' contention. *See Simmons*, 512 U.S. at 156 (plurality opinion) (limiting holding to cases where "state law prohibits the defendant's release on parole"); *id.* at 158 (noting that South Carolina officials had testified that "any offender in petitioner's position was in fact ineligible for parole under South Carolina law"); *id.* at 162 (noting that Simmons had asked three times "to inform the jury that in fact he was ineligible for parole under state laws"); *id.* at 165 (defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was legally ineligible for parole"); *id.* at 165 n.5 (defendant entitled to rebut future dangerousness "with the fact that he is ineligible for parole under state law"); *id.* at 166 (noting that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate"); *id.* at 167 n.7 (reciting statutory law from thirty-seven States regarding rules governing parole eligibility and right to inform jury); *id.* at 168 (stating that, "[i]n a State in which parole is available" the defendant has no right

to inform the jury); *see also id.* at 176 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that "the only available alternative sentence . . . was life . . . without the possibility of parole"); *id.* ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact"); *id.* at 178 ("the only alternative . . . under state law was life . . . without possibility of parole").[11]

Indeed, this unmistakably clear language has led numerous courts to conclude exactly as the Fourth Circuit has concluded: *Simmons* does not extend to cases in which the defendant would be eligible for parole upon a life sentence ***under state law***. *See, e.g., Miller v. Johnson*, 200 F.3d 274, 290-291 (5th Cir. 2000); *Coe v. Bell*, 161 F.3d 320, 346 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999); *Ingram v. Zant*, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994) (per curiam), *cert. denied*, 513 U.S. 1167 (1995); *State v. Bey*, 736 A.2d 469, 502 (N.J. 1999); *State v. White*, 709 N.E.2d 140, 156 (Ohio), *cert. denied*, 120 S.Ct. 345 (1999); *State v. Billings*, 500 S.E.2d 423, 427 (N.C.), *cert. denied*, 525 U.S. 1005 (1998); *State v. Feaster*, 716 A.2d 395, 441 (N.J. 1998); *Griffith v. State*, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998), *cert. denied*, 120 S.Ct. 77 (1999); *State v. Bush*, 942 S.W.2d 489, 503 (Tenn.), *cert. denied*, 522 U.S. 953 (1997); *Philpot v. State*, 486 S.E.2d 158, 160 (Ga. 1997), *cert. denied*, 522 U.S. 1054 (1998); *State v. Simpson*, 479 S.E.2d 57, 61

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[11] Ramdass asserts that the Fourth Circuit incorrectly "assum[ed] that [state law] circumscribe[s] the federal right." (Pet. Br. at 19). As demonstrated in the text, however, it was *Simmons* itself that defined the federal right in terms of a status created by state law.

(S.C. 1996), *cert. denied*, 520 U.S. 1277 (1997); *Oken v. State*, 681 A.2d 30, 41 (Md. App. 1996); *State v. Montez*, 927 P.2d 64, 74 (Ore. 1996), *cert. denied*, 519 U.S. 1079 (1997).

Nothing in *Simmons* supports an argument allowing a federal habeas court to decide *de novo* the state law issue of whether a defendant will be made ineligible for parole by a life sentence or, as here, to redetermine the eligibility issue contrary to the express ruling of the state supreme court. Ramdass does not cite any authority that supports his novel theory. Instead, he attempts to evade the clear import of *Simmons* by reference to cases which, not only have nothing to do with the particular rule in *Simmons*, § 2254(d) or the "new rule" doctrine, but which are wholly inapposite on any level.[12]

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[12] Ramdass' "custody" analogy, for example, is irrelevant to the rule in *Simmons*. In *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases, this Court has defined the familiar rule requiring specific warnings prior to police initiated custodial questioning as applying when a reasonable person would feel he was not free to leave, and has held the issue of "custody" to be a federal question of mixed fact and law. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). That rule obviously has no connection, in principle or application, to the issue of whether a federal court may redetermine state parole law for the purpose of instructing a state court capital sentencing jury. Even further removed from the present case is the interpretation of the "in custody" provision of § 2254(a). That term has been broadly construed by this Court so as to give federal courts jurisdiction over habeas petitions filed by state prisoners; it never has been circumscribed by state law. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

As an initial matter, the reason Ramdass' analogies fail is that his underlying premise is simply wrong. Contrary to his contention, the rule in *Simmons* is not one involving "federal law [that] overlays state laws," depending "on the operational consequences of state-law rules, not on the characterization that a state court or legislature puts on those rules." (Pet. Br. at 28). As the above-cited passages from *Simmons* make clear, it is precisely the defendant's legal status ***under state law*** that triggers the due process right to inform the jury. That due process right is wholly dependent upon how state law defines the prisoner's parole eligibility status, as plainly expressed repeatedly in both the plurality and concurring opinions of *Simmons*.

Moreover, the Fourth Circuit accurately observed that,

> as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

(JA 399). Put another way, *Simmons* recognized that parole eligibility can have no meaning outside of what state law says it means. Whether thought of in terms of "practical," "functional" or "technical," an inmate is either eligible for parole or he is not. Whether looked at as a definitional or result-oriented matter, the "operational consequences" of state parole eligibility law are absolutely equivalent to its "characterization" by the

state court. There are no gray areas of parole eligibility: the inmate's sentence or sentences either render him ineligible for parole under state law or they do not.

Indeed, were the rule in *Simmons* somehow divorced from the defendant's parole eligibility under state law, it would have no workable meaning at all, much less any practical means by which it could be applied or even reviewed. If, as *Simmons* holds, a defendant may inform his jury that a life sentence will render him ineligible for parole, then state law must determine whether the defendant would be ineligible and, therefore, whether the *Simmons* rule applies.[13]

Furthermore, Ramdass' collection of cases involves the wholly irrelevant issue of whether a state law itself violates the Constitution.[14] Ramdass, however, never has

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[13] Ramdass suggests that constitutional error occurred because the jury's exact question was not answered. (Pet. Br. at 27). The right created in *Simmons*, however, is not dictated by whether or what a jury asks; rather, it narrowly defines the parameters of what information a court must allow to be imparted to the jury about parole by way of rebuttal: if the defendant requests, the jury must be informed that a life sentence will result in parole ineligibility. A jury may have many legitimate concerns, *e.g.*, whether there is generally a possibility of release, whether the sentence may be commuted, whether the defendant will be held in a maximum security center, whether he will have contact with visitors, whether he will have access to weapons, etc. However, the only information regarding post-conviction procedures that this Court has mandated must be imparted to the jury is, where applicable, parole ineligibility.

[14] *Bakery & Pastry Drivers & Helpers v. Wohl*, 315 U.S. 769 (1942), a First Amendment case, reversed a state court ruling

challenged the constitutionality of the Virginia parole eligibility statute or the Virginia Supreme Court's parole eligibility determination. (Pet. Br. at 20: "Virginia can define [its statute] however it wishes, and Ramdass will have no federal basis for complaint"). Under *Simmons*, a State is free either to provide or prohibit parole eligibility for inmates, as well as to define by statute the factors triggering ineligibility. Certainly nothing in *Simmons* curtails the State's right to qualify or disqualify an inmate for parole eligibility. Indeed, unlike the cases cited by

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that no First Amendment rights attached unless there was a labor dispute. *Bailey v. Alabama*, 219 U.S. 219 (1911), a direct appeal case, invalidated under the Thirteenth Amendment a state statute that made criminal the failure to pay a debt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975), a pre-"new rule" federal habeas case, held that, under *In re Winship*, 397 U.S. 358 (1970), a state may not place the burden of proof of lack of malice upon the defendant, even if malice is not an element of the crime under state law. *Hicks v. Feiock*, 485 U.S. 624 (1988), simply remanded a contempt conviction to state court to determine whether the proceeding was criminal or civil and to vacate the conviction as a result of a burden-shifting presumption only if found to be criminal. *Memphis Steam Laundry Cleaners v. Stone*, 342 U.S. 389 (1952), a Commerce Clause case, found a state tax discriminated against interstate commerce under any definition of the tax. *Railway Express Agency v. Virginia*, 347 U.S. 359, 369 (1954), another Commerce Clause case, likewise found a state tax to be an impermissible "privilege" tax, partly because the state legislature had so labeled it. *Henderson v. Mayor*, 92 U.S. 259 (1875), yet another Commerce Clause case, held that a New York law imposing a fee for each foreign passenger arriving there was a tax in contravention of free commerce. *Collins v. New Hampshire*, 171 U.S. 30 (1898), still another Commerce Clause case, struck down a state law making it a crime to sell oleomargarine unless colored pink because the law was, in effect, a prohibition on the sale of oleomargarine.

Ramdass in which state laws conflicted with specific constitutional provisions, a determination of parole eligibility does not conflict with, or even implicate, the Constitution. *See Greenholtz v. Nebraska*, 442 U.S. 1, 7 (1979) (the Constitution creates no liberty interest in discretionary parole). A State's law establishing parole eligibility or ineligibility cannot result in the denial of due process articulated in *Simmons* because the due process right is itself defined by the state law governing eligibility.

Simmons, of course, discusses at length the wide variety of state statutes governing parole eligibility. *See Simmons*, 512 U.S. at 167 n.7 (plurality opinion). The Virginia Supreme Court applied its own statute and ruled that Ramdass could not have informed his jury that he would be rendered ineligible on a capital murder conviction precisely because that conviction would not have rendered him ineligible under § 53.1-151(B)(1). The Virginia Supreme Court's ruling certainly did not impugn any constitutional provision.

Simmons specifically contemplated the result obtained here: "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact." *Simmons*, 512 U.S. at 176 (O'Connor, J., concurring); *accord* 512 U.S. at 168 (plurality opinion). It thus expressly conditioned its new due process rule upon a determination under ***state law*** of parole ineligibility. Because the Virginia Supreme Court authoritatively determined that Ramdass would not have been ineligible for parole under Virginia law, the rule in *Simmons* simply affords him no relief.

D. Virginia Law

Ramdass admits, as he must under the clear language of *Simmons*, that state law determines his parole eligibility status. According to his theory, however, there are two kinds of state law: one determined by the state supreme court and another determined by a federal court. As his argument goes, the Virginia Supreme Court was free to find what the "technical" law was, but only the federal court may define the "real" state law for purposes of *Simmons*. In the final analysis, Ramdass' novel theory is nothing more than a surreptitious attempt to demonstrate the impossible: that the Virginia Supreme Court was wrong on a matter of Virginia law.[15] This, of course, contravenes decades of settled precedent holding that state courts are the sole and final arbiters of state law. *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 94-101 (1998); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Gryger v. Burke*, 334 U.S. 728, 731 (1948).

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[15] The Fourth Circuit accurately observed that Ramdass never contested the Virginia Supreme Court's parole eligibility determination in state court. (JA 390). However, because Ramdass had made "the broader, more basic claim" of *Simmons* error in state court, the Fourth Circuit rejected the respondent's default argument. (*Id.*). Ramdass no longer directly contests the validity of the Virginia Supreme Court's determination, but rather argues indirectly that a federal court is free to find parole eligibility under his nebulous theory of "functional and common sense ineligibility."

As the Fourth Circuit aptly held,

> The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court ***only*** on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

(JA 401).[16] The Fourth Circuit went on to make clear, however, that, even if it could reinterpret Virginia law, it "would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim." (*Id.*).

The Court of Appeals' analysis unquestionably was correct. The Virginia Supreme Court interpreted Virginia Code § 53.1-151(B)(1) in a straightforward manner: before an inmate can be disqualified from parole eligibility, he

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[16] Unquestionably, the gravest error committed by both the magistrate judge and the district court was the unprecedented holding that a federal court was empowered to overrule a state supreme court on a matter of state parole law based on the mistaken view that the Virginia Supreme Court had "contradicted more than one hundred years of Virginia law." (JA 350-351).

must have three convictions for separate offenses of murder, rape or armed robbery and the convictions may not be considered unless and until final judgment has been entered. (JA 130-131). The state court ruled that Ramdass would not have been disqualified from parole eligibility by a life sentence for capital murder because that offense only could have counted as the second qualifying conviction under the statute. (JA 130). It further held that, under *Smith v. Commonwealth*, 113 S.E. 707, 709 (Va. 1922), a "conviction" means the entry of final judgment. Thus, the Domino's Pizza guilty verdict could not count as one of the three required convictions because no final judgment had been entered at the time Ramdass' capital jury was deciding what sentence to impose. (JA 131).

This ruling was beyond reproach. No Virginia prison or prison official may exert any control over any person until that person has been both convicted of a felony and sentenced to serve at least one year in prison. Va. Code § 53.1-20 (custody over persons convicted of felony and sentenced to a year or more); § 19.2-310 (persons not transferred to prison until sentenced by court).[17] Moreover, as the Fourth Circuit observed,

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[17] It is only capital murder defendants who ever will want to expedite the finding of parole ineligibility to the earliest possible time. Only such defendants can hope to obtain perverse benefit from the State's determination that, by virtue of repeated and violent crimes, the defendant is too dangerous ever to be released on parole. The vast majority of a State's inmates will seek to stave off a finding of parole ineligibility to the last possible moment. The Virginia Supreme Court is charged with interpreting state law which is equally applicable to all inmates, not just capital felons.

Sound reasoning supports *Smith*'s holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith*'s factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment – even if it appears to be only a formal step of the process – in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural protection against unfairness or corruption.

* * *

As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the *Smith* definition of conviction is appropriate, or even necessary. Upon amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury.

(JA 402-403).[18]

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[18] Despite the district court's finding that Ramdass' "arbitrary Virginia Supreme Court" claim was defaulted (JA 333), the Fourth Circuit rejected it on the merits "only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim." (JA 403; see also Pet. Br. at 27: "The Virginia Supreme Court's . . . avoidance of the rule in *Simmons* . . . leaves an important federal due process right subject to . . . manipulable state-court characterizations of state law"). As the Court of Appeals noted, such an argument also is defeated by the fact that, in a contemporaneous case, the Virginia Supreme Court had vacated the inmate's death sentence and remanded for resentencing because it found the inmate to have been parole ineligible and thus entitled to a *Simmons* instruction. (JA 403). *See Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Significantly, Ramdass no longer relies upon Virginia case law that he cited in the Fourth Circuit. That case law, as it turned out, actually proved that ***over one hundred years ago*** the Virginia Supreme Court had recognized that the word "convict," when used in statutes relating to prisons, meant "adjudged guilty of felony by the ***final judgment*** of the Court." *See Blair v. Commonwealth*, 66 Va. 850, 858 (1874) (emphasis added).

Ramdass, however, urges this Court to find as follows: even though state law requires a final sentencing order before the conviction can count towards parole ineligibility and, even though the Domino's Pizza case had no final sentencing order yet entered, it makes no sense to count the Pizza Hut conviction and not the Domino's Pizza verdict because they both had the same chance of being set aside by the trial judges under a Rule of Court. (Pet. Br. at 37-38). As if this remarkable illogic were not enough, Ramdass then simply misstates the record by arguing that the Virginia Supreme Court "recognized" this "setting aside" theory, "dismissed" it as a "hypothetical future development" and yet inconsistently accepted it with respect to the Domino's Pizza verdict. (*Id.* at 38).[19]

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[19] The district court carried this illogical reasoning even further, finding as Ramdass had argued in that court that there was "no logical reason" why the Virginia Supreme Court would count the ***capital murder*** conviction as one of the three necessary strikes while not counting the Domino's Pizza

Whatever Ramdass means by setting up this straw-man, what is clear is that it played no part in the Virginia Supreme Court's decision. The "setting aside" argument was neither made nor considered in state court. The Virginia Supreme Court's decision was based solely upon the state law determination that § 53.1-151(B)(1) allows consideration of convictions upon which judgment has been entered, but does not allow consideration of convictions upon which no judgment has been entered. Whether or not such a judgment may be overturned or set aside ***afterwards*** is completely irrelevant to the issue of whether it may be counted in the first place under § 53.1-151(B)(1). Final sentencing is the *sine qua non* of Virginia's parole eligibility statute. Without a final sentencing order, the offense cannot disentitle an inmate to parole eligibility.

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robbery. (JA 357). Ramdass appears to have dropped this nonsensical argument in favor of Judge Murnaghan's equally weak reasoning in his dissent. (JA 415). Obviously, the capital murder must be counted as if final judgment had been entered because the essence of a *Simmons* instruction is to inform the jury with certainty as to what will occur if the jury imposes a life sentence and that becomes the judgment. Just as obvious, however, is the fact that the reason the Pizza Hut convictions count and the Domino's Pizza verdict did not was because, as the Virginia Supreme Court held, a judgment had been entered on the former and not the latter. Under the defective reasoning of Judge Murnaghan, the district court and Ramdass, ***no*** conviction could count under § 53.1-151(B)(1) as long as it was subject to any form of reversal, *e.g.*, motion for new trial, appellate or habeas review. Of course, such is not the case: the Virginia Supreme Court simply and reasonably held that the point at which a conviction may count towards parole ineligibility is when the final judgment has been entered.

Ramdass' view of Virginia law, while irrelevant to the validity of state law as authoritatively explicated by the Virginia Supreme Court, nevertheless is dead wrong. Ramdass contends repeatedly that the Domino's Pizza final judgment was "foreseeable, imminent and inexorable." He mischaracterizes the entry of that judgment as a "ministerial act," a mere "formality" or "technicality." Nothing could be further from the truth.

At the time the Fairfax jury was deciding whether to sentence Ramdass to death on January 30, 1993, Ramdass was awaiting sentencing on the Alexandria Domino's Pizza case. State law clearly gave the Alexandria judge the unfettered authority to set aside the guilty verdict under Virginia Supreme Court Rule 3A:15(b), a fact Ramdass concedes. (Pet. Br. at 17 n.5). Indeed, in Virginia, a trial judge is vested with the total – and unreviewable – discretion to set aside a jury's verdict. A decision to acquit or vacate is not appealable or subject to mandamus: the Commonwealth is without a remedy to challenge such a decision in any way. *See* Va. Const. Art. VI § 1 ("no appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person"); *Campbell v. Commonwealth*, 431 S.E.2d 648, 655 (Va. 1993) (noting that no appeal by Commonwealth permitted in a criminal case except under very limited conditions: Va. Code §§ 19.2-317, -398 allow appeals in criminal cases involving the state revenue and from pretrial orders holding a statute unconstitutional or suppressing evidence under the Fourth, Fifth or Sixth Amendments).[20]

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[20] On January 1, 1997, the Virginia Constitution was amended to allow the Commonwealth to appeal in criminal

Ramdass contends it was "inconceivable that [he] would somehow escape judgment" on the Domino's Pizza case. However, there was ***nothing*** to prevent him from arguing in that case, or the Alexandria judge from concluding, that, in light of the death sentence already imposed, it would have been overkill to convict him of robbery. Or, because Ramdass' crime spree involved multiple serious offenses occurring in different jurisdictions, the prosecutors in the other jurisdictions simply could have decided not to pursue the other cases in light of the death sentence already obtained in Fairfax. The Alexandria prosecutor certainly had the discretion to inform the court that the Domino's Pizza case would not be pursued.

Ramdass' "ministerial" argument is squarely in conflict with Virginia criminal procedure.[21] A final judgment on the Domino's Pizza case was no more "inexorable" than a judgment in the as-yet-to-be-tried cases involving the Alexandria Bragg Towers robbery, the Arlington taxicab robbery or the Alexandria murder. Under Ramdass' faulty reasoning, he would have been entitled to a *Simmons* instruction simply because he was planning to plead

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cases to the extent permitted by the General Assembly and Constitution. 1996 Va. Acts cc. 40 and 911. In 1997, the General Assembly expanded the Commonwealth's right to appeal in criminal cases to include an appeal from a pretrial bail order, Va. Code § 19.2-398(B), and an appeal to the Virginia Supreme Court from an adverse ruling by the Virginia Court of Appeals. Va. Code § 19.2-317.

[21] Judge Murnaghan based his dissent, in large part, upon the same misinterpretation of Virginia law. (JA 415).

guilty in those other three cases, a result certainly not contemplated by *Simmons*.

Not surprisingly, Ramdass never has articulated the instruction he believes *Simmons* entitled him to give the jury. This is because the hypothetical instruction that would have had to have been given in Ramdass' case in order to convey accurate information to the jury demonstrates how far removed Ramdass' case is from *Simmons*. In order to impart accurate information to the jury about Virginia law, an instruction would have had to have stated:

> You are instructed that the conviction in this case will count as the second of three convictions necessary to make the defendant ineligible for parole under state law and that, therefore, if you choose a life sentence, that sentence will not render the defendant ineligible for parole.
>
> In another court, however, the defendant has been tried by a jury and found guilty of another offense but a judgment of conviction has not yet been entered in that case. Under Virginia law, the court in that case is authorized to set aside that guilty verdict or retry the case before a final judgment is entered.
>
> If the court in that case enters a judgment of conviction upon the jury's verdict, it would count as a third conviction making the defendant ineligible for parole for that conviction. However, if the court in that case decides to set aside or retry, or for any other reason does not enter judgment, the jury's verdict in that case could not render the defendant ineligible for parole if you elect to fix punishment at life.

Nothing in *Simmons* even remotely requires imparting such speculative, contingent information to a capital sentencing jury. As the Fourth Circuit observed, the most Ramdass is left with is a complaint

> about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge – the Kayani murder – first, in which case he would have had only one qualifying conviction at the time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

(JA 401-402).[22] The Court of Appeals was correct that Ramdass has no more valid a claim now than he would have had if he had been tried for the capital murder first. He was eligible for parole under state law unless and until a third conviction was entered as a final judgment.

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[22] Ramdass could have asked the trial court for a continuance or for any other relief he believed appropriate regarding the consequences of the scheduling of his trials, but he made no such motion or objection.

Unless a capital murder conviction would constitute the third or subsequent strike, the jury could not be instructed accurately that such a conviction would result in parole ineligibility.[23]

E. The Virginia Supreme Court's Decision Was Not Contrary to Clearly Established Law.

The very fact that the Virginia Supreme Court determined that Ramdass could not have been disqualified from parole eligibility under § 53.1-151(B)(1) by virtue of his capital murder conviction removes this case from the bounds of *Simmons*. In *Simmons*, there was no dispute over the inmate's parole eligibility status. State officials had testified that Simmons was ineligible for parole and the prosecution conceded that fact, although it sought to

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[23] Ramdass notes that he could not have been released during the three weeks between his capital sentencing and entry of the Domino's Pizza judgment because under § 53.1-151(A), he would have been required to serve at least twelve years of his sentences from the Pizza Hut robberies before becoming eligible for parole. (Pet. Br. at 25 n.6). From this fact, he reasons that, "from the date of the capital sentencing trial forward," he was ineligible for parole. (*Id.*). This faulty syllogism, however, only underscores Ramdass' misperception of *Simmons*. There is no doubt that, on the day of sentencing, ***no*** capital murderer will be eligible for ***release***, but that fact is irrelevant under *Simmons*. The information that a defendant is entitled to tell the jury is ***not*** that he will not be released before sentence is imposed, but rather that he will be ineligible for parole on the jury's sentence of life. Under § 53.1-151(C), the most Ramdass' jury accurately could have been told with respect to parole eligibility classifications for a life sentence on the capital crime was that Ramdass would have become eligible for parole after serving twenty-five years of a life sentence.

demonstrate that Simmons would be eligible for ***other*** forms of release. *See Simmons*, 512 U.S. at 158 (plurality opinion). Simmons was ineligible for parole and thus entitled to relief whereas Ramdass was eligible for parole and thus not entitled to relief.

Ramdass discusses at length what South Carolina supposedly argued in *Simmons*. According to Ramdass, South Carolina argued that Simmons had not yet been found to be ineligible for parole, this Court rejected that position and then independently found Simmons to be ineligible. (Pet. Br. at 40-41). Ramdass is wrong.[24] But, even accepting such a spin on *Simmons* as hypothetically true, that circumstance could have no impact on Ramdass' case because the ***Virginia Supreme Court has found as a matter of state law that Ramdass was not ineligible for parole.***

The most fundamental difference between *Simmons* and Ramdass' case, however, is implicitly acknowledged in Ramdass' off-repeated refrain that his Domino's Pizza conviction was "foreseeable, imminent, and inexorable."

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[24] Neither the transcript of oral argument in *Simmons* nor the brief of the State of South Carolina supports the contention that South Carolina argued that Simmons was "technically" eligible for parole. What South Carolina argued was that "this defendant, or any defendant sentenced to a life without parole sentence" nevertheless could be eligible for ***other*** forms of release. *Simmons*, Tr. of Oral Arg., 1994 U.S. TRANS LEXIS 133 at 42 (Jan. 18, 1994). In its brief, the State pointed out that only the Parole Board could determine eligibility, *see Simmons*, Resp. Br. at 95, but it did not argue, as Ramdass has alleged, that Simmons was not ineligible "until the parole board said so." (Pet. Br. at 40). To the contrary, as this Court is well aware, South Carolina conceded that Simmons was ineligible for parole.

As he must, even Ramdass recognizes in this refrain that, while Simmons ***had been sentenced*** for a prior offense qualifying under South Carolina's statute[25] and thus would have been rendered ineligible for parole by the capital murder conviction, Ramdass ***had not been sentenced*** for the Domino's Pizza crime and his capital sentence thus would have counted only as the second of three convictions required by state law. (Pet. Br. at 21, 36).

Ramdass' claim and the rule in *Simmons* are hopelessly at odds: there simply is no support in *Simmons* for the proposition that a state court's determination of parole eligibility may be overturned in federal court by a "functional" or "practical" definition of eligibility. The question before this Court, however, is not whether it is possible to glean such an interpretation of the law from *Simmons*, but rather whether, at the time of the Virginia Supreme Court's decision, such an interpretation was "clearly established Federal law, as determined by [this] Court." *See* § 2254(d)(1). Given the plain language in *Simmons* repeatedly stressing that parole ineligibility is a matter of state law, conditioning its new rule upon a state law determination, and the complete absence in *Simmons* of any warrant for the nebulous standard Ramdass proposes, it simply cannot be said that a "functional" interpretation of parole ineligibility was "clearly established."

Further, in the related "new rule" context, this Court has held that an important measure of whether the state court "acted objectively unreasonably" is whether the

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[25] The South Carolina statute rendered inmates ineligible for parole upon sentencing for a second qualifying offense. *See Simmons*, 512 U.S. at 158 n.2 (plurality opinion).

prisoner's claim was "susceptible to debate among reasonable minds." *O'Dell*, 521 U.S. at 160, *quoting Butler v. McKellar*, 494 U.S. 407, 415 (1990). If an issue is "susceptible to debate," then *a fortiori*, it could not have been "compelled" by precedent. *Butler*, 494 U.S. at 414.

Ramdass' claim undeniably is "susceptible to debate" even today. The rule he seeks would extend *Simmons* to any case in which a capital defendant may become ineligible for parole depending on the occurrence of events outside the parameters of the case being tried. And, although he denies that he is asking to inform the jury about his "prospects for parole" (Pet. Br. at 38 n.8), there is no principled way to so limit the rule he seeks. If due process entitles him to tell the jury that it is highly unlikely he will be paroled because he probably will be made ineligible by hypothetical future convictions, then he also should be able to tell the jury that it is highly unlikely he will be paroled because he will not become eligible for many years, possibly not until after his expected lifespan, or because he is such a dangerous individual that there is no "practical possibility" that any parole authority would release him. While this Court conceivably could extend the concept of "due process" in this manner in a direct appeal case like *Simmons*, it cannot do so in a collateral case.

That such a rule is "susceptible to debate" and, thus, an impermissible new rule cannot be denied. In *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 354 (1997), Justice Stevens was joined by three other Justices in questioning whether the rule in *Simmons* should extend to defendants who are eligible for parole. 118 S.Ct. at 355-356. If that question is "susceptible to debate" in this Court years after *Simmons*

was decided, then Ramdass' claim asking for *Simmons* to apply to him despite the Virginia Supreme Court's determination of parole eligibility certainly is "susceptible to debate" and, thus, new. *See Moore v. Reynolds*, 153 F.3d 1086, 1115 (10th Cir. 1998) (declining to decide in prisoner's favor whether *Simmons* applies to parole eligible defendants because issue is "arguable" after *Brown v. Texas*, and, therefore, "new").

Section 2254(d)(1) and the "new rule" doctrine combine to mandate that a state court's judgment will not be reversed in a federal collateral proceeding unless the prisoner's claim was "clearly established" and "compelled" by this Court's precedent at the time of the state court's decision. The Fourth Circuit properly applied these clear mandates. The Virginia Supreme Court's decision that *Simmons* did not require a no-parole instruction in Ramdass' case was not contrary to or an unreasonable application of this Court's clearly established precedent; *a fortiori*, neither was the rule Ramdass seeks compelled or dictated by such precedent.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted:

RONALD J. ANGELONE, DIRECTOR,
Respondent herein

MARK L. EARLEY
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

APPENDIX A

OFFENSE	DESCRIPTION	DATE OF OFFENSE	TRIAL	JUDGMENT
purse–snatching, drug dealing, stealing moped, breaking & entering, escape	juvenile offenses	* * *	* * *	punished as juvenile
robbery	Fairfax - no deadly weapon	juvenile – tried as adult	* * *	1988 – 7 years
murder	Alexandria -not capital	7/15/92	guilty plea after capital judgment	10/7/93 –life sentence run concurrent with other sentences
robberies	Fairfax Pizza Hut – w/deadly weapon	8/25/92	jury trial before capital trial	1/22/93 – 76 years
robbery	Alexandria Bragg Towers – w/deadly weapon	8/29/92	guilty plea after capital judgment	2/18/93 – 14 years
attempted murder and robbery	Arlington taxicab driver – w/deadly weapon	8/30/92	guilty plea after capital judgment	11/3/93 – 2 life sentences run concurrent with other sentences
robberies	Alexandria Domino's Pizza – w/deadly weapon	8/30/92	jury trial 1/7/93	2/18/93 – 18 years
capital murder and robbery	Fairfax 7-Eleven	9/2/92	jury sentencing – 1/30/93	4/2/93 - death penalty

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In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

In contending that Ramdass seeks an extension of the rule in *Simmons v. South Carolina*, 512 U.S. 154 (1994), the respondent recasts Ramdass's submission as a claim that federal courts should second-guess state courts in determining whether state prisoners are ineligible for parole. This argument misconceives both Ramdass's claim and the rule in *Simmons*.

Ramdass seeks no review of Virginia's determination of his parole status at the moment of his capital sentencing trial. Rather, he merely invokes the federal rule, established in *Simmons*, that remote, "hypothetical future developments" that could conceivably lead to a prisoner's release are not sufficient to deny the jury accurate information on the impossibility, *under state law*, of the prisoner being paroled in the future. The Virginia Supreme Court's error was not in its interpretation of the state's "three strikes" statute, or in its determination that Ramdass was classifiable as parole-eligible and would remain so for 19 days after his capital sentencing trial. Its error was that it failed (a) to determine whether Ramdass's 19-day window of parole eligibility created any actual possibility that he would ever be paroled, and (b) to recognize that, if there was no such possibility, Ramdass was entitled under the clearly established rule of *Simmons* to inform the jury of "the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Simmons*, 512 U.S. at 162 (plurality opinion).

The constitutional violation in *Simmons* was that, despite the prosecution's claim that Jonathan Simmons

would be dangerous in the future unless he was executed, "the trial court precluded the jury from learning that [he] would never be released from prison." *Id.* at 176 (O'Connor, J., concurring). The trial judge in Ramdass's case, applying pre-*Simmons* Virginia law, did exactly the same thing. The respondent makes only a feeble attempt to deny that Ramdass "would never be released from prison" under state law. Instead, the respondent relies almost entirely on his claim that *Simmons* affords no protection – even to a defendant who can never be released from prison – unless the state has already affixed upon him the technical label of "parole ineligible" at the moment of his capital sentencing trial. This argument trivializes the rule of *Simmons*, and it should be rejected.

1. Under State Law, Ramdass Had No Possibility of Being Released on Parole

The respondent devotes only two pages of his brief to the issue that lies at the heart of this case: whether, under Virginia law, there remained any possibility that Ramdass could ever be released on parole. (Resp. Br. at 35-36). That was the question that the jury asked, and that *Simmons* required to be answered. Ramdass has already shown why the correct answer to the question was, "No." The respondent's arguments to the contrary only serve to bear this out.

First, the respondent suggests that the judge in the Domino's Pizza case in Alexandria might have concluded that, "in light of the death sentence already imposed, it

would have been overkill to convict him of the robbery."[1] (Resp. Br. at 36). Given the significance of this "third strike" in extinguishing any possibility of parole, the respondent's suggestion that the Alexandria court might have casually decided to toss out the jury's guilty verdict on the Domino's Pizza robbery as "overkill" is not plausible. Equally strained is the respondent's speculation that the prosecutor might have simply dismissed the Domino's Pizza robbery case, *after* a jury had rendered a verdict of guilty, and after the trial judge had denied Ramdass's post-trial motions. Although the respondent describes such inexplicable derelictions of duty as within the discretion of the Alexandria court and prosecutor, they had no such discretion under Virginia law.[2] Even if they did, the likelihood that any prosecutor or judge would behave in this way is obviously negligible, and did not create, at the time of Ramdass's capital sentencing, any genuine possibility that Ramdass would ever be considered for parole. The respondent's inability to propose

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[1] In making this argument, the respondent has apparently forgotten that the issue is whether the Alexandria court would have reduced the third strike to judgment, thereby sealing Ramdass's lifelong parole ineligibility, had the capital murder jury sentenced him *to life imprisonment*, rather than to death.

[2] Prosecutors have no authority to nolle prosse a charge unilaterally, and a trial court has discretion to nolle prosse a charge only on the Commonwealth's showing of good cause. Va. Code Ann. § 19.2-265.3 (Michie 1995) (unchanged since 1979) ("Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefore shown"). Except on motion of the Commonwealth under § 19.2-265.3, or on motion of the accused under Virginia Supreme Court Rule 3A:15(b), trial courts have no authority to decline to enter judgment following a jury's verdict.

any less fanciful route by which Ramdass might have averted parole ineligibility is proof that, at the time of his capital sentencing, no such escape hatch existed.

Despite its failure to identify any real possibility of parole, the respondent warns that a truthful parole instruction would necessarily have been laden with elaborate qualifications. (Resp. Br. at 37). This concern is unfounded.[3] Although the prosecution is *entitled* to inform the jury of even remote possibilities of eventual release, *California v. Ramos*, 463 U.S. 992, 1002-04 (1993), in this case the trial judge could have accurately answered the jury's question about whether parole was possible for Bobby Lee Ramdass with a simple "No." As in *Simmons*, such an answer would not have included all the remote "hypothetical future developments" that might conceivably lead to a defendant's eventual release. But it would certainly have been far less misleading than the trial court's refusal to answer the jury's parole question at all, especially after the prosecution had repeatedly informed the jury that Ramdass was on parole at the time of the capital murder.[4] *Simmons*, 512 U.S. at 166 (plurality

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[3] The respondent's proposed instruction (Resp. Br. at 37) is a red herring. It erroneously presumes that a jury, rather than a court, would determine whether state law allows any possibility of the defendant being considered for parole in the future. Juries, of course, are finders of fact, not of law.

[4] Given that the jury was struggling with whether Ramdass posed a future danger, and if so, whether that danger justified his execution, it must have been especially bewildered by the court's instruction, given in response to the jury's question about parole, that "[Y]ou are not to concern yourselves with what may happen afterwards." (JA 91).

opinion) ("Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether 'life imprisonment' means life without parole or something else").

Although the respondent warns of grave consequences from instructing juries on the practical realities of a defendant's situation, as *Simmons* requires, the real danger is posed by the respondent's effort to restrict *Simmons* to the defendant's technical parole status at the moment of sentencing. For if what happened in this case comports with *Simmons*, any state wishing to deny both parole consideration and accurate jury instructions to capital murder defendants need only declare that an inmate's ineligibility for parole begins when he is formally classified as "ineligible" by executive officials on admission to prison, and thus avoid the *Simmons* rule without actually extending parole consideration to even a single convicted capital murderer. In fact, the now-superseded South Carolina procedure involved in *Simmons* itself could provide the model for such a post-*Ramdass* rejiggering of state sentencing procedures, because if Virginia is right about what *Simmons* requires, this Court would have to have denied rather than granted relief in *Simmons*.[5]

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[5] South Carolina's post-*Simmons* revision to its capital sentencing statute, S.C. Code Ann. § 16-3-20 (Law Co-op. Supp. 1999), provides another potential model for states that want to avoid the rule in *Simmons* without allowing for the possibility of parole, as Ramdass detailed in his Petition for a Writ of Certiorari at 20-21.

2. *Simmons* Established That Ephemeral "Parole-Eligible" Status on the Day of Sentencing Does Not Extinguish a Defendant's Right To Rebut a Claim of Future Dangerousness by Informing the Jury of the Actual Unavailability of Parole

Because he cannot identify any real possibility that Ramdass could ever have been released on parole, the respondent is left to argue that the reality of Ramdass's situation does not matter. Rather, the respondent urges that the federal constitutional right identified in *Simmons* begins and ends with what amounts to a freeze-frame determination of how a single state statute characterizes a defendant's parole status at the moment of his capital sentencing trial. The respondent does this simply by stressing, out of context, the Court's unremarkable use of the term "parole ineligibility" in *Simmons*, and on that basis alone insists that *Simmons* protects only that subset of non-parolable capital defendants who have already been labeled as such on the day the instruction is given.

If the respondent were correct, *Simmons* itself would have to have been decided differently. As Ramdass already has pointed out (Pet. Br. at 40-43), at the time of Jonathan Simmons's capital sentencing trial, his parole status remained to be determined in the future by the South Carolina Board of Probation, Parole and Pardon Services, and under South Carolina law, the trial court had no authority to make any binding determination of whether Simmons qualified for a statutory exception to the recidivist no-parole provision. *State v. McKay*, 386 S.E.2d 623, 623-24 (S.C. 1989). Indeed, in announcing the rule that *Simmons* would later partially invalidate, the South Carolina Supreme Court noted that its own prior

decisions permitting courts to instruct juries about restrictions on parole "present practical problems in their application," and explained:

> [t]he trial court is, in effect, required to rule upon a particular defendant's eligibility for parole before sentence has even been imposed. This determination may involve novel issues of law, or statutory provisions which have not been interpreted. Moreover, there is no way to be assured that the Parole Board would reach the same conclusion as the court.

State v. Torrence, 406 S.E.2d 315, 323 (S.C. 1991) (Chandler, J., concurring, for a majority of the court). The state brought *McKay* and *Torrence* to this Court's attention, Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003, at 95-96, and the South Carolina Supreme Court's decision in *Simmons* was itself replete with references to *Torrence*. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993). Nevertheless, the Court found no reason to doubt that "the operation of South Carolina's sentencing law" ensured that Simmons would "never be released from prison," *Simmons*, 512 U.S. at 177-78 (O'Connor, J., concurring), and held that the trial court's concealment of this fact from the sentencing jury was fundamentally unfair.[6]

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[6] Although a plurality of the Court stated that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate," *Simmons*, 512 U.S. at 166, neither South Carolina's brief nor the transcript of oral argument in this Court contains any such admission respecting Jonathan Simmons's parole status at the time of his sentencing trial. The plurality may have been referring to

That is not to say that parole or other release would have been an absolute impossibility. Indeed, South Carolina pointed to several possible post-trial developments – including "legislative reform, commutation, clemency, and escape" – that might have resulted in Simmons's release.[7] *Id.* at 166 (plurality opinion). However, the *Simmons* plurality dismissed these "hypothetical future developments" as insufficient to justify South Carolina's blanket refusal to inform capital sentencing juries of the unavailability of parole. *Id.* The extremely remote possibility that Ramdass's third strike might not be reduced to judgment shortly after his sentencing trial is in the same category of "hypothetical future developments," and it does not remove this case from the clearly established ambit of the *Simmons* rule.

Simmons safeguards the right to rebut the prosecution's claim of *future* dangerousness.[8] The rule of *Simmons*

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testimony in the *Simmons* record by an attorney for the state Department of Corrections who described the operation of South Carolina's recidivist statute. However, even this testimony included the caveat that a repeat violent offender would be classified as ineligible for parole only if his offenses did not involve "the same series of events." Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 11-12; 1993 WL 669003 at *11a-*12a. As the Court clearly understood, South Carolina law consigns this question to a post-trial determination by the executive branch.

[7] Legislative reform might include, for example, a modification of the state's parole law that resulted in the defendant being reclassified from ineligible to eligible for parole.

[8] If the prosecution argues only that the defendant is dangerous on the single day of the capital sentencing trial,

could not accomplish this purpose if it depended on a freeze-frame assessment of the defendant's eligibility for parole on the single day of his sentencing trial. Just as the prosecution's dangerousness claim necessarily looks to the future, so too must the defendant's right of reply. What the jurors wanted to know, and what *Simmons* entitled Ramdass to tell them, was whether there was a possibility he could be released on parole in the months and years *after* his trial, at any point before the end of his natural life. The Virginia Supreme Court failed to address this question, and thus also failed to consider, under *Simmons*'s clearly established rule, the federal constitutional implications of the only answer that Virginia law and the facts of Ramdass's case permit. The district court remedied this error, as 28 U.S.C. § 2254(d)(1) required it to do, and its judgment granting the writ should be reinstated.[9]

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rather than that the defendant will be dangerous in the future, the right of rebuttal under *Simmons* does not arise. "[I]f the prosecution does not argue *future* dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole." *Simmons*, 512 U.S. at 176-77 (O'Connor, J., concurring) (emphasis added).

[9] For the same reason that the writ was properly granted by the district court under 28 U.S.C. § 2254(d)(1), relief is not barred by the new rule doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

DAVID I. BRUCK
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

F. NASH BILISOLY
Counsel of Record
JOHN M. RYAN
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510
(757) 446-8600

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION RESOURCE CENTER
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Counsel for Petitioner